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REPORTS

OF

SIR GEORGE CROKE, KNIGHT,

OF

SELECT CASES

ADJUDGED IN THE

COURTS of KING's-BENCH and COMMON-PLEAS,

IN THE REIGNS OF

QUEEN ELIZABETH, KING JAMES, and KING CHARLES I.

IN FOUR VOLUMES.

VOLUME THE FIRST—PART THE FIRST,

FROM THE

TWENTY-FOURTH TO THE THIRTY-EIGHTH YEAR

OF

QUEEN ELIZABETH.

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LAW DEPARTMENT.

WE, all knowing the great learning, wiſdom, and integrity of the Author, do, for the common good, allow and approve the publiſhing of this book, in the ſame letter and dialect as now is printed.

Robert Foſter.
Orl. Bridgman.
Matthew Hale.
Thomas Malet.
Robert Hyde.
Edward Atkins.
Thomas Twiſden.
Thomas Tyrrill.
Chr. Turner.
Samuel Browne.
Wad. Wyndham.

REPORTS

OF

SIR GEORGE CROKE, KNIGHT,

FORMERLY ONE OF THE

JUSTICES

OF THE

COURTS of KING's-BENCH and COMMON-PLEAS,

OF SUCH

SELECT CASES

AS WERE ADJUDGED IN THE SAID COURTS DURING THE

REIGN of QUEEN ELIZABETH.

COLLECTED AND WRITTEN IN FRENCH,

By HIMSELF;

REVISED AND PUBLISHED IN ENGLISH,

By SIR HARBOTTLE GRIMSTON, BARONET,
MASTER OF THE ROLLS.

THE FOURTH EDITION, CORRECTED,

WITH

MARGINAL NOTES and REFERENCES to the LATER REPORTS,

AND OTHER BOOKS OF AUTHORITY,

By THOMAS LEACH, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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AND T. WHIELDON, FLEET-STREET.

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TO THE

KING's MOST EXCELLENT MAJESTY,

CHARLES THE SECOND,

BY THE GRACE OF GOD,

KING of GREAT-BRITAIN, FRANCE, and IRELAND,
DEFENDER of the FAITH, &c.

MOST GRACIOUS SOVEREIGN,

WITH that duty and humility which becomes a loyal and obedient ſubject, I offer up to your royal patronage the learned works of a prudent, grave, and pious Judge; the author deceaſed and now with God. When he left the world, he left with me theſe precious fruits of his travel in the common laws of *England*; and it hath been my care to ſend them abroad for the public good. It was firſt in my purpoſe to dedicate them to your ſacred majeſty; the grand MECÆNAS of the common law; aſſuring myſelf, the uſefulneſs to be ſuch, and your majeſty's diſpoſition ſo princely, that you would not deny to receive them with a gracious hand. But unhappily hindered of my purpoſe, to mine unſpeakable grief, by the extreme difficulty of public addreſs to your majeſty's ſacred perſon, divided from your good ſubjects by the cruel, wicked, bloody, and deſperate practices of horrid intruders and uſurpers, inforced to yield to the neceſſity of the times, I ſent forth the two former works of this eminent Judge, with a Preface only, to encourage gentlemen in the ſtudy of that law; which I conceived was the beſt way, not only to evidence your majeſty's moſt juſt, undoubted, and hereditary right to your three imperial crowns, of your now again famous and flouriſhing kingdoms; but likewiſe to reſtore your majeſty to your prerogative royal, and to give you that ſupremacy which is due to your ſovereign authority.

And now thoſe black and bloody clouds are happily diſpelled by the miraculous brightneſs of your majeſty's preſence, to whom ſhould I dedicate the works of this learned Judge but to your royal goodneſs, to whoſe ſervice I have devoted my tongue, my pen, my heart, and all the offices of my life; and upon whom not only the eyes, and hearts, and hopes of all your own loyal ſubjects (delighted to ſee the moderation of your government), but of all the proteſtant world, are fixed (as the true heir and real inheritor of your royal father's graces and virtues, our late king of ever-bleſſed memory, and now moſt glorious ſaint and martyr); whoſe divine and heavenly inſtructions, together with the gifts of nature and grace, wherewith God hath richly ſtored your princely mind, calls you to great matters, and promiſeth great effects, and fills with great hopes all thoſe that fear God; who eſteem you as a plant of God's own ſetting, which he dreſſeth with his own hand, watereth with his grace, and daily fructifieth to his glory.

ROYAL SIR, the reſtitution and preſervation of the law, juſtice, government, and the happy policy of our civil ſtate, next under God, is due to yourſelf; being to this nation another CHARLEMAINE. For as it was his impreſs upon the reverſe of his coin, "*decem præceptorum cuſtos* "*Carolus magnus*," ſo may it truly, next under "*defenſor* "*fidei*," be engraven upon the circle of your crown, "*Legis Anglicanæ Cuſtos Carolus ſecundus.*"

Which law of *England* is nothing elſe but an artificial perfection of reaſon; and therefore my LORD COKE tells us, "If all the reaſon that is diſperſed into ſo many ſeveral "heads were united into one, yet he could not make ſuch "a law as the law of *England* is; becauſe by many ſucceſſion of ages, it hath been fined and refined by an "infinite number of grave and wiſe men, as now by the "learned labours of this reverend Judge; and by long "experience is grown to ſuch perfection for the govern-"ment of this realm, as the old rule may juſtly be "verified of it, "*Neminem oportet eſſe ſapientiorem legibus*;" 'No man out of his own private reaſon ought to be wiſer than the law, which is the perfection of reaſon (*a*)."

(*a*) Co. Lit. 97. b.

Neither is this law for prince and people only as they be in a body politic, but alſo for the ſingular benefit of the church

church of God, the rights and liberties whereof the common law maintaineth inviolably; being, as Judge *Forteſcue* defineth the ſame, "*Sanctio ſancta jubens honeſta, prohibenſque contraria* (*b*). The ſame in effect which *Cicero* ſaith in his ſecond book DE NATURA DEORUM, *Lex eſt recti præceptio, pravi eſt depulſio.* Wherefore religion and the law do ſtand together, do mutually uphold each other, and are concentered in their original and end; they both come from God, and tend to God. And as religion, ſo the law was given, *ut cives faciat bonos*, ſaith the philoſopher; and therefore the law in a chriſtian ſtate is not only convenient, but neceſſary, that no ſtate can ſtand and flouriſh without it. Hence it is, that where religion doth find a due regard, a conſcientious practice, and the law a willing ſubmiſſion, and a cheerful obedience; there, if anywhere in the world, the prince will be glorious, and the people happy.

(*b*) De Laudibus Legum Angliæ, chap. 3.

EXCELLENT SOVEREIGN,

YOUR weighty affairs do call me off, and command brevity. I will yield obedience in both, but muſt firſt humbly crave your pardon in uſing your moſt illuſtrious name in the dedication of theſe books. It hath been no unuſual thing to dedicate to kings the writings of famous men; nor will it be inglorious to your highneſs to vouchſafe *theſe* your patronage: for whilſt you countenance worth and worthy men, your virtue will contend with your fortune, and your goodneſs bear up an equal balance with your greatneſs; and then ſhall the deceaſed author, in theſe deſerving works of his, live before you, who for his mere merits was made a Judge of this realm by your royal father, according to that ancient and honourable rule and way of law preferment mentioned by FLETA, *nec prece, nec pretio, nec præmio:* and having ſkilfully and faithfully ſerved in that place above ſixteen years, and, by his exceeding care and pains in that ſervice, worn out his weak and aged body, humbly petitioned his majeſty, that he might render up the office HE gave him, and wholly retire into the country.

To which petition, your majeſty's royal father gave a moſt gracious anſwer, mentioned at large in my Preface to

the Third Part (*a*) of this worthy Judge's Reports, though firſt printed, which cannot be expreſſed but in his own words, without injury to his incomparable ſtyle, *viz.* "to the "end all our loving ſubjects, who have and ſhall faith-"fully ſerve us (as we declare this our ſervant hath "done), may know, that as we ſhall never expect, much "leſs require or exact from them performances beyond "what their healths and years ſhall enable them; ſo we "ſhall not diſmiſs them without an approbation of "their ſervice, when we ſhall find they deſerve it, much "leſs expoſe them in their old age to neglect, &c."— And thereupon he continued him ſtill Judge of the king's bench, and gave him the like allowance and fee he paid to the reſt of the Judges, till a *certiorari* came from the great Judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory.

And now I beſeech your majeſty, as the juſt payment of a due debt to the honourable aſhes of this worthy Judge, my dear father-in-law; and as the earneſt of a far greater, to the father of our country, your ſacred majeſty; to accept this poor oblation from the heart and hands of him, who makes it his daily prayers, that you may live long, and triumphantly reign; and that your SCEPTRE may, like AARON'S ROD, bud and bloſſom, and be an eternal teſtimony againſt all rebels.

Your Majeſty's

Moſt loyal Subject,

And obedient Servant,

HARBOTTLE GRIMSTON.

(*a*) Theſe Reports were originally publiſhed in the inverted order of the reigns of *Elizabeth*, *James*, and *Charles*; and they were accordingly diſtinguiſhed by cotemporary authors in that order of publication, by 1. 2. and 3. Croke; but they were entitled by the original editor, and are here referred to by him, in the proper order of the ſeveral reigns, which is now become the more uſual mode of quoting them; but perhaps, more properly by their reſpective titles of *Croke Elizabeth*, *Croke James*, *Croke Charles*; which is the mode of reference adopted by the preſent editor.

TO THE

STUDENTS

OF THE

COMMON LAWS

OF

*ENGLAND**.

"REASON is the life of the law," ſaith that grave father and ſage thereof, SIR EDWARD COKE: "Nay, the common law itſelf is nothing but learned "reaſon, or the perfection of reaſon, gotten by much ſtudy "and obſervation; which, by many ſucceſſion of ages, "hath been fined and refined by an infinite number of "grave and learned men; and by long experience grown "to ſuch a perfection for the government of this realm, "as the old rule may be juſtly verified of it; *No man of "his own private reaſon ought to be wiſer than the law (a).*

"This law," as ſaith the ſame author, "conſiſteth of "three parts.—FIRST, On reports and judicial records.— "SECONDLY, On ſtatutes contained in acts and records of "parliament.—AND THIRDLY, On the common cuſtoms "of the realm, grounded upon reaſon, and uſed time out "of mind, &c."

(a) Co. Lit. 97. b. See alſo 394. b.

The conſtruction and explanation of all which belongs to the Judges of the realm (*b*). For though the law is the rule, yet in itſelf it is but mute; THE JUDGE is *lex loquens*, whoſe judgments and reaſons given in court, leſt they ſhould vaniſh with the breath that uttered them, or being written in the memory of the hearers only, ſhould be more frail and fluid than human nature itſelf; the wiſdom of our former kings appointed four Reporters, to commit to writing, and truly to deliver, as well the words ſpoken, as the judgments and reaſons thereupon given in our courts at *Weſtminſter*. They were choſen men, and conferred all together at the

(*b*) Coke Inſt. 344. a. *Optimâ legum eſt conſuetudinis interpres eſt res perpetuâ ſimiliter judicata.* Coke Inſt. 130. a. Plowd. Prologue to his Commentaries. Coke Preface to the Third Report, pag. 7. Hobert Rep. fol. 252.

* This Preface was originally affixed to *Croke Charles*.

making and ſetting forth any book of Reports; which book, in reſpect of the number of the Reporters and their approved learning, carried great credit, "as juſtly it de-"ſerved," ſaith *Mr. Plowden.* Hence it is that all our Year Books of Law-reports, from the beginning of the reign of king *Edward* the third until the latter end of king *Henry* the eighth, received their being, and continue their repute with us to this preſent. If we have ſince failed in the number of the perſons reporting, it hath been amply recompenſed in the grandeur and authority of one ſingle author, SIR JAMES DYER, *Chief Juſtice of the common pleas,* by whoſe great learning, and aſſiduous ſtudy, the ſaid judgments and law reſolutions have been tranſmitted and perpetuated until the twenty-fourth year of the reign of the late queen *Elizabeth*; ſince when there hath not been any continuation or dependance of term or time in the *Lord Coke*'s Reports, or in any other approved law-author to this preſent, whereby a conſtant ſeries or diary of our law reſolutions in our courts at *Weſtminſter,* might have been propagated unto us; by which *interſtitium,* in theſe licentious times, *non tam reſcripta et judicum ſcita, quam propudia et ſæverioris literaturæ impropria immodicè ſcaturiunt.* A multitude of flying Reports (whoſe authors are as uncertain as the times when taken; and the cauſes and reaſons of the judgments as obſcure, as by whom judged) have of late ſurreptitiouſly crept forth; whereby inſtead of that plentiful and profitable increaſe, which thoſe fields, thus by a vigilant huſbandman tilled, would have yielded to our ſtudents; we have been entertained with barren and unwarranted products, *infælix lolium et ſteriles avenæ*; which not only tends to the depraving the firſt grounds and reaſon of our ſtudents at the common law, and the young practitioners thereof, who by ſuch falſe lights are miſled, and thereby their clients cauſes either delayed or miſcarried, and multiplicity of law-ſuits rather cheriſhed than ſuppreſſed; but alſo to the contempt of our common law itſelf, and of divers our former grave and learned Juſtices and profeſſors thereof; whoſe honoured and reverend names have, in ſome of the ſaid books, been abuſed and invocated to patroniſe the indigeſted crudities of thoſe plagiaries; the wiſdom, gravity, and juſtice of our preſent Juſtices not deeming nor deigning them the leaſt approbation or countenance in any their courts; purſuing therein the judgement and practice of the reverend SIR HENRY HOBART, who, when *Serjeant Henden, Termin. Mich. 20. Jac.* at the common

common pleas bar, in *Godfrey Wade's Caſe*, vouched for authority DALISON's *printed Reports*, demanded of him by what warrant thoſe reports of DALISON's came in print.

Having therefore many, or rather one continued fifty years work by me, of the ſummary Reports or Commentaries of that grave, pious, and learned Juſtice, SIR GEORGE CROKE, KNT. which he began about the time when the *Lord Dyer* ended his Reports, and is uninterruptedly continued by him (our author) until near his deceaſe; and not willing to deprive this preſent age or poſterity of ſo much good; fearing alſo leſt after my deceaſe they ſhould be obtruded to the public by an in curious law hand, or, through ſordid ignorance of ſome others, be proſtituted in the contemptible *pamphlet-dreſs* and character of ſuch their blind and miſhapen Reports *(dignum patella opertulum)*, as ſome of our late Juſtices and profeſſors of law are in that kind abuſed *(a)*; whereby the very majeſty of the law is prophaned, the authority of Reports leſſened, and the matters in their books rendered leſs uſeful to our ſtudents; I have taken upon me the reſolution and taſk of extracting and extricating theſe Reports out of their dark originals; they being written in ſo ſmall and cloſe an hand, that I may truly ſay they are *folia ſybillina*, as difficult as excellent; and have thereunto added the ſeveral Tables and Indexes of the names of the Caſes, and the chief matters therein contained. I would have ſent them forth in their native idiom, the proper and peculiar phraſe of our common law, wherein they are ſuccinctly, ſenſibly, and fully reported; "there "being many words in them ſo appropriated, as that they "cannot be ſo legally expreſſed by any other word, or by "any periphraſis or circumlocution *(b)*," if not otherwiſe by preſent authority inhibited. In regard the whole work is too voluminous to be compriſed in one book, I have, according to the ancient method obſerved in our Law Reports, reduced them to the number of our kings and queen in whoſe reign taken; and as well in obſervance of the advice of the *Lord Coke* to the ſtudents of our common law, "that they ſhould firſt read the later Reports, be-"cauſe for the moſt part the later reſolutions and judg-"ments are the ſureſt, and therefore beſt to ſeaſon them "therewith at the beginning, both for the ſettling of "their judgments, and retaining them in memory; and

(b) Co. Lit. 9. a. Co. lib. 4. 39. b.

(a) There be certain legal formalities and ceremonies peculiarly appropriated and antiently continued amongſt us; ſo as they ſeem now to be eſſentials of the law itſelf, and ought not without the ſupreme authority be changed or diſuſed: ſuch are thoſe which are obſerved by our author in the creation of ſerjeants at law, &c. And ſuch I conceive are the writing of the orders and records of courts in ſuch peculiar hands, the printing of Law Reports in their proper letter and native language.

" are eaſier to be underſtood than the antient (a);" as alſo for that I would in a ſeaſonable time *provocare ad vivos*, upon *Tacitus'* grounds, and not improperly in his own words, it being now, " *ultra quindecim annos (grandè mortalis ævi ſpatium) in quibus multi fortuitis caſibus intercederunt; pauci, et ut ita dixerim, non modò aliorum, ſed etiam noſtri ſuperſtites ſumus, exemptis è mediâ vitâ tot annis, quibus juvenes ad ſenectutem, ſenes prope ad ipſos exactæ ætatis terminos per ſilentium venimus.*"—' Above fifteen ' years (a great part of man's age) wherein many have ' been waſted by uſual chances, a few of us only remaining, ' that have over-lived, as I may ſay, not only others, but ' alſo ourſelves, ſo many years ſubducted out of the midſt ' of our life, in which we proceeded in ſilence from young ' men to aged, from aged almoſt to the grave.'—In which ſpace, the chiefeſt both at bench and bar have been taken from us by death; ſome few only, who were then *anteſignani* with them, and now *primi cerii in foro noſtro Weſtmonaſterienſi* remaining alive with myſelf (who for the greateſt part of the time in taking theſe Reports, had the honour to be at the feet of this *Gamaliel*), whom I may vouch to atteſt with me the candour and integrity of our author, as well upon the bench, as in writing this work; wherein he never ſought to draw to himſelf the glory of any argument or opinion delivered by another, but, were he at the bar or bench, hath faithfully ſet down his ſaid judgment or opinion, and yielded him his due commendation. I have therefore *firſt* publiſhed the *laſt* part of his Reports, conſiſting of ſuch choice judgments and reſolutions only, wherein himſelf was both Judge and relator; who, without oſtentation, might have fitly applied that of SYRACIDES unto himſelf: " *Ego ultimus evigilavi, tanquam is qui ſpicas legit poſt meſſores; profeci benedictione domini, et tanquam vindemiator, implevi torcularis lacum: conſiderate, me mihi non ſoli laborâſſe, ſed omnibus quærentibus eruditionem.*"—' I am awaked up ' laſt of all, as one that gathereth after them in the ' vintage; in the bleſſing of the Lord I am increaſed, ' and have filled my wine-preſs like a grape-gatherer; ' behold, I have not laboured for myſelf alone, but for all ' them that ſeek knowledge.'—To whoſe worthy memory I think myſelf obliged, *præ-libaminis loco aliquid parentari.*

(a) Co. Lit. 349. b.

Tacitus in vita Julii Agric.

Eccleſiaſticus cap. xxxiii. v. 15 & 16.

This reverend judge SIR GEORGE CROKE was deſcended of an ancient and illuſtrious family called LE BLOUNT. His anceſtor in the time of the civil diſſenſion betwixt *York* and *Lancaſter* (as *Juſtice Markham*, taking part with king *Edward* the fourth, was relegated during the reign of king *Henry* the ſixth; and as JUSTICE FORTESCUE, ſiding with

Henry

Henry the ſixth, abſented himſelf in the time of king *Edward* the fourth, ſo), being a fautor and aſſiſtant unto the houſe of *Lancaſter*, was inforced to ſubduct and conceal himſelf under the name of *Croke*, till ſuch time as king *Henry* the ſeventh moſt happily reconciling thoſe different titles, this our anceſtor in his *poſtliminium*, aſſuming his ancient name, wrote himſelf CROKE *alias* BLOUNT (that of *Blount* being altogether omitted by our Judge's father upon the marriage of his ſon and heir *Sir John Croke* with the daughter of *Sir Michael Blount* of *Maple-Durham* in the county of *Oxon*). This CROKE *alias* BLOUNT had iſſue *Sir John Croke* (grandfather to our Judge), who, being a ſix-clerk in chancery, was reſtrained marrying, until enabled by the ſtatute of 14. *Hen.* 8. and being in much favour with the king, was by him made one of the maſters of chancery. He took to wife the daughter of *Sir Ambroſe Cave* of *Leiceſterſhire*, Knight, by whom he had iſſue *Sir John Croke* of *Chilton* in the county of *Buckingham*, Knight, a man of great modeſty, charity, and piety; who, in the year of queen *Elizabeth*, was by her made the firſt high ſheriff for that county, divided from *Bedfordſhire*. He took to wife *Elizabeth*, the daughter of *Alexander Unton*, Eſq. and by her had iſſue five ſons. viz. *Sir John Croke*, *Henry Croke*, our author SIR GEORGE CROKE, *Paul Ambroſe Croke*, and *William Croke*. *Sir John Croke*, eldeſt ſon of *Sir John*, inherited his father's virtues and fortunes, and was very famous for his wiſdom, eloquence, and knowledge in our laws. Being Speaker of the parliament in the forty-third year of the reign of queen *Elizabeth*, he received his *elogium* at the end thereof from her majeſty; that he had proceeded therein with ſuch wiſdom and diſcretion, that none before him had deſerved better. He was recorder of *London*; and in *Eaſter Term* in the firſt year of the reign of king *James* the firſt was knighted, and made ſerjeant at law; and in *Eaſter Term* in the fifth year of the ſaid king advanced by him to be one of his Juſtices of the then court of king's bench; where he ſo continued until the twenty-third of *January*, in the ſeventeenth year of the ſaid king's reign; at which time he departed this life at his houſe in *Holborn*, leaving behind him a plentiful eſtate and iſſue.

Statute 14. Hen. 8. cap. 8.

Henry Croke the ſecond ſon, and *Paul Ambroſe Croke* the fourth ſon, were grave profeſſors of the common law; and the laſt of them reader of the *Inner-Temple*.

William Croke, the fifth ſon, was a man of an humble ſpirit, and piouſly diſpoſed, addicting himſelf wholly to a country life.

SIR

Sir George Croke, the third ſon, and author of this work, was born about the ſecond year of the reign of *Queen Elizabeth*, and paſſed over his infancy and tender years under the wings and care of a moſt diſcreet and loving mother, in the exerciſe of all good qualities, giving thereby very early ſigns of his future perfection in learning. When time and diligent inſtruction had made him fit for a remove, he was ſent to *Oxford*, to improve the talent of his natural ingenuity with the help of the arts and ſtudy of philoſophy. After ſome abode there, he was again tranſplanted to the *Inner-Temple*; where he employed the remaining part of his youth in the ſtudy of our common law, and was double reader of that houſe. Upon the twenty-ninth of *June*, in the twenty-firſt year of the reign of king *James* the firſt, he received his writ of being ſerjeant at law, and the ſame day was knighted, and made the king's ſerjeant. Upon the eleventh of *February*, in the twenty-ſecond year of the reign of *James* the firſt, he was created one of the Juſtices of the common pleas, and continued in that place until *Michaelmas Term*, in the fourth year of the reign of *Charles* the firſt; at which time, upon the death of that learned and grave Judge *Sir John Doderidge*, he was advanced to be one of the Juſtices of the then king's bench; from whence I ſhall take a ſhort ſurvey of him.

See the Epiſtle Dedicatory, ante.

He was of a moſt prompt invention and apprehenſion, which was accompanied with a rare memory, by means whereof, and through his ſedulous and indefatigable induſtry, he attained to a profound ſcience and judgment in the laws of the land, and to a ſingular intelligence of the true reaſons thereof, and principally in the forms of good pleading. He was of an univerſal and admirable experience in all other matters which concerned the commonwealth. He heard patiently, and never ſpake but to purpoſe, and was always glad when matters were repreſented unto him truly and clearly: he had this diſcerning gift, to ſeparate the truth of the matter from the mixture and affection of the deliverer, without giving the leaſt offence. He was reſolute and ſtedfaſt for truth; and as he deſired no employment for vain glory, ſo he refuſed none for fear; and by his wiſdom and courage in conſcionably performing his charge, and carefully diſcharging his conſcience, and his modeſty in ſparingly ſpeaking thereof, he was without envy, though not without true glory. To ſpeak of his integrity, and forbearing to take bribes, were a wrong to his virtue. In ſum, what *Tacitus* ſaith of *Julius Agricola*'s wife's father, who was a governor in *Britain*, I may truly ſay of this

Baker's Chronicle, page 504. E.

this *Agricola*, our reverend Judge, my wife's father: "*Agri-* Tacitus in vita
"*cola tempore curarum remiſſionumque diviſa; ubi conventus* Agricolæ.
"*ac judicia poſcerent, gravis, intentus, ſeverus, et ſæpius miſe-*
"*ricors; ubi officio ſatisfactum, nulla ultra poteſtatis perſonâ;*
"*triſtitiam et arrogantiam et avaritiam exuerat; nec illi, quod*
"*eſt rariſſimum, aut facilitas authoritatem, aut ſeveritas amo-*
"*rem, diminuit.*"

'That he well and diſcreetly divided the ſeaſons of his 'affairs and vacations. In times of audience and judgment 'he was grave, heedful, auſtere, and yet merciful too. 'That duty performed, no face any more or ſhow of au-'thority; ſevere and ſtately looks were laid apart in ſuch 'ſort, that neither his gentle and courteous behaviour 'weakened the reverence, nor his ſeverity the love due to 'his perſon.'

He was of a ſtrict life to himſelf, yet in converſation full of ſweet deportment and affable, tender and compaſſionate, ſeeing none in diſtreſs whom he was not ready to relieve: nor did I ever behold him do any thing more willingly than when he gave alms. He was every way liberal, and cared for money no further than to illuſtrate his virtues. He was a man of great modeſty, and of a moſt plain and ſingle heart; of an ancient freedom an dintegrity of mind, eſteeming it more honeſt to offend than to flatter or hate. He was remarkable for hoſpitality; a great lover and much beloved of his country, wherein he was a bleſſed peace-maker, and in thoſe times of conflagration was more for the *bucket* than *bellows*, often pouring out the waters of his tears to quench thoſe beginning flames which others did ventilate. In religion, he was devout towards God, reverent in the church, attentive at ſermons, and conſtant in family duties. Whilſt he lived, he was the example of the life of faith, love, and good works, to ſo many as were acquainted with his equal and even walkings in the ways of God, through the ſeveral turnings and occaſions of his life: and though now dead, ſtill continues to do good, being the founder of a chapel, which he cauſed to be dedicated and ſet apart for the ſervice and worſhip of God, and for the eaſe of the inhabitants of *Studeley* (being an hamlet and member of *Becbley* in *Buckinghamſhire*, and at leaſt two or three miles diſtant from that pariſh church); as alſo of an hoſpital for poor people, both which he endowed with a liberal revenue. At laſt this pious and learned Judge (finding his age and infirmities to increaſe, and being deſirous, before he put off his decaying and declining body, to have ſome leiſure to examine his life, and to prepare for that

great-

great day wherein all muſt render an account to the Supreme Judge of their actions) was an humble ſuitor to the late king for his *writ of eaſe*, which was denied, and yet in effect granted. And for the rareneſs, I ſhall recite both petition and anſwer, which are as followeth, &c.

TO THE KING's MOST EXCELLENT MAJESTY,

THE

HUMBLE PETITION

OF

YOUR MAJESTY's HUMBLE SERVANT,

SIR *GEORGE CROKE*, KNIGHT,

ONE OF THE JUSTICES OF YOUR BENCH,

HUMBLY SHEWETH,

" THAT he having by the gracious favour of your " majeſty's late father of famous memory, and of your " majeſty, ſerved your majeſty, and your ſaid late father, " as a Judge of your majeſty's court of common pleas, " and of your highneſs' court called the king's bench, above " this ſixteen years, is now become very old, being above " the age of eighty years: and by reaſon of his ſaid age " and dulneſs of hearing, and other infirmities, whereby " it hath pleaſed God to viſit him, he findeth himſelf diſ- " abled any longer to do that ſervice in your courts, which " the place requireth, and he deſireth to perform; yet is " deſirous to live and die in your majeſty's favour:

" *His moſt humble ſuit is, that your majeſty will be pleaſed to* " *diſpenſe with his further attendance in any your majeſty's* " *courts; that ſo he may retire himſelf and expect God's* " *good pleaſure, and, during that little remainder of his* " *life, pray for your majeſty's long life and happy reign.*

GEORGE CROKE."

THE KING's ANSWER.

" UPON the humble addreſs, by the humble petition " of SIR GEORGE CROKE, *Knt.* who after many years ſer- " vice done both to our deceaſed father and our ſelf, as " our ſaid father's ſerjeant at law, and one of his and our

" Judges

" Judges of our benches at *Weſtminſter*, hath humbly be-
" ſought us, by reaſon of the infirmity of his old age
" (which diſableth him to continue to perform to us that
" ſervice he much deſireth to have according to his duty
" done), his further attendance might be by us in our grace
" diſpenſed with; to the end all our loving ſubjects, who
" have, and ſhall faithfully ſerve us (as we declare this our
" ſervant hath done) may know, that as we ſhall never ex-
" pect, much leſs require, or exact from them perform-
" ances beyond what their healths and years ſhall enable
" them; ſo we ſhall not diſmiſs them without an appro-
" bation of their ſervice, when we ſhall find they ſhall
" have deſerved it, much leſs expoſe them in their old age
" to neglect: As our princely teſtimony, therefore, that
" the ſaid *Sir George Croke* being diſpenſed withal, proceeds
" from us at the humble requeſt of the ſaid *Sir George*
" *Croke* (which we have cauſe and do take well, that he
" is rather willing to acknowledge his infirmity, by his
" great age occaſioned, than that by the concealing of the
" ſame any want of juſtice ſhould be to our people), and
" not out of any our leaſt diſpleaſure conceived of him;
" do hereby declare our royal pleaſure, that we are graci-
" ouſly pleaſed, and do hereby diſpenſe with the ſaid *Sir*
" *George Croke*'s further attendance in our ſaid bench at
" *Weſtminſter*, and any our circuits. And as a token of
" our approbation of the former good and acceptable ſer-
" vice, by the ſaid *Sir George Croke* done to our deceaſed
" father and our ſelf, do yet continue him one of our
" Judges of our ſaid bench. And hereby declare our fur-
" ther will and pleaſure to be, that during his the ſaid
" *Sir George Croke*'s life, there ſhall be continued and paid
" by us unto him the like fee and fees as was to him, or
" is or ſhall be by us paid to any other our Judges of
" our ſaid bench at *Weſtminſter*, and all fees and duties,
" ſaving the allowance by us to our Judges of our ſaid
" benches for their circuits only."

Soon after, this good Judge (having been an early labourer in the Lord's huſbandry, and endured the heat of the day till the eleventh hour, whereby he obtained the promiſed penny of this life, which Wiſdom hath in ſtore for her children, *viz.* length of days on his right hand, and on his left riches and honour) made an holy retreat to his houſe at *Waterſtoke* in *Oxfordſhire*; where, full of aſſurance that Chriſt would be unto him in death advantage, he not long after cheerfully reſigned up his ſoul into the hands of him that gave it. And upon his tomb, there erected

erected at the charges of his virtuous lady and relict, *Mary*, the daughter of *Sir Thomas Bennet*, Knight, for the lasting memory of his name, whose service deserved the favour of his prince and country, there is this inscription:

GEORGIUS CROKE *Eques Auratus, unus Justitiariorum de banco regis, judicio linceato et animo præsenti insignis; veritatis hæres, quem nec minæ nec bonos allexit; regis authoritatem et popu'i libertatem æqua lance libravit; religione cordatus, vita innocuus, manu expansa, corde humili pauperes irrogavit; mundum et vicit et deseruit anno ætatis suæ LXXXII. annoq; regis* Caroli *XVII. annoque domini MDCXLI.*

Whereunto I shall subjoin,

Horat. lib. 1. Ode 24.

" ——————*Cui pudor, et Justitiæ soror*
" *Incorrupta fides, nudaque veritas:*
" *Quando ullam invenient parem?*"

" ——————Unto whom both modesty,
" And justice sister (faith, from scandal clear)
" And naked truth: when will they find a peer?"

Concerning the whole work itself, I may, I think, and not immodestly, use the words of the *Roman Præco* proclaiming the LUDI SECULARES, " *Venite et videte quod nemo* " *mortalium vidit aut visurus est*," a work of our Law Reports by one man taken and continued beyond a Jubilee; whereof this part contains the Cases of so late time, that thereby it hath the advantage of former opinions concerning most of the *Quæres* controverted in the elder books, giving a resolution to many of them; and hath also clearly explained several of our late statutes, delivered divers most exact rules for pleading, and carefully set down all legal formalities in the creation of Serjeants at Law, Judges, &c. with other the ceremonies and orders of their precedency, their times of sitting in court, keeping of essoins, adjournment of Terms, and other such ancient rights and usages of our common law; whereby the honour and very being thereof hath been preserved. Of all which I would remind our student of the observation which is given him by SIR EDWARD COKE, " That there is no knowledge, " case, or point in law, seem it of never so little account, " but will stand him in stead at one time or other; and " therefore, in reading, nothing to be pretermitted (*a*)."

(*a*) Co. Lit. 5. a.

The method herein used is likewise considerable; not being stuffed with the pleadings at large, and their many continuances, with the same arguments at bar and bench reinforced *pro et contra*; but here the case is shortly stated according to the points in law therein to be discussed and adjudged,

adjudged, the reaſons plainly and ſuccinctly laid down, and yet the matter intended truly uttered, and, as near as may be, in the name and words of the party who delivered it, and the former authorities to warrant the ſame ſummarily vouched; ſo as the book is *(ad compendium præparatus quantumq; ratio paſſa eſt; ita moderatè repreſſus, ut nec prodiga ſit in eâ copiâ, nec damnoſa concinnitas)* already abridged, and, as far as the ſubject matter will permit, equally balanced; ſo as neither its affluence ſhall cloy, or its conciſeneſs be a loſs to our ſtudents. This book alſo paſſeth, in ſurety of law, moſt of our former Reports, which were chiefly compoſed of the ſudden ſpeeches of the Juſtices, upon the motion of Caſes by the ſerjeants and counſellors at the bar. But moſt of the Caſes herein be matters in law tried upon demurrer, or by ſpecial verdict, containing matters in law, which both were debated by thoſe of the bar and bench to the uttermoſt; and in the end allowed, or, for the cauſe ſhewn, diſallowed; and whereof the author himſelf had a copy, ſtudied, argued, and after great deliberation gave his judgment or reſolution in every of them: and ſo they be moſt firm and ſure to truſt unto.

Julius Solinus in Epiſt. Polyhiſt. inſcripta.

Plowd. Prologue to his Commentaries.

And whereas it is the advice of SIR EDWARD COKE to ſtudents, "that they ſhould look not only to the caſes "reported, but unto the records of the pleadings and "judgments therein, which much confirm the credit of the "report, and the reader's ſurety of the law *(a)*;" in moſt of the Caſes here reported, the number roll, when and where entered, is prefixed; that thereby if any ſcruple or doubt of error ſhould be in the report, the ſtudent might have a ready recourſe thereunto. And herein alſo I ſhall further ſecure you, that as already, before the publiſhing hereof, moſt of the preſent Juſtices have had a peruſal of the authentic and original manuſcript books of theſe Reports, compoſed in their genuine language; ſo when the reſt of them for the public good ſhall, either in their original or by tranſlation, be made common, I ſhall with the ſame care and reverence, like another PISANE LETTER *(b)*, preſerve them, as choice monuments of his great prudence

Plowd. Prologue, &c. (a) Co. Lit. 370. a. 209. 217.

(b) The emperors from *Juſtinian*, who died 565, until *Lotharius* II. in the year 1125, ſo much neglected the body of the civil law, that all that time none ever profeſſed it. But when the emperor *Lotharius* II. took *Amalfi*, he there found an old copy of the Pandects, or Digeſts, which as a precious monument he gave to the *Piſans*; by reaſon whereof it was called *Litera Piſana*; from whence it hath been ſince tranſlated to *Florence*, &c. and is never brought forth but with torch-light, or other reverence. *Carin. Crom. lib. 4. fol. 418. Selden's Annotations upon Forteſcue, fol. 20, 21.*

and

and unwearied induſtry that collected them; and will be ready at any time hereafter to produce them for proof or confirmation of what I have or ſhall publiſh out of them, when by the honourable Juſtices, or upon any important occaſion, I ſhall be thereunto required.

I ſhall not need to apologize for myſelf in making public theſe Reports, wherein I had the only propriety, by the free donation of the reverend author: the work I hope will not need it. If I find this acceptable, I ſhall cheerfully give birth to the other volumes of this eminent perſon. For as it is my comfort (that God hath vouchſafed), ſo it ſhall be my endeavour, that I may any way (though but thus inſtrumentally) uſe my hand in the leaſt ſervice tending to a general good; *det Deus ut perficiam.*

FROM MY MANOR-HOUSE *of* GORHAMBURY, *May 7th*, 1657. HARBOTTLE GRIMSTON.

" *Hæc ſtudia adoleſcentiam alunt, ſenectutem oblectant,*
" *ſecundas res ornant, adverſis perfugium præbent,*
" *delectant domi, non impediunt foris, pernoctant*
" *nobiſcum, peregrinantur, ruſticantur.*".

CICERO *pro* ARCHIA *poeta.*

PREFACE

TO THE

FOURTH EDITION.

THE attention of the Editor, in preparing the preſent edition of SIR GEORGE CROKE'S REPORTS for the preſs, has been confined to the following alterations:

THE TEXT, which in many places was unintelligibly faulty, has been cautiouſly corrected, by an attentive and careful collation of the laſt edition with the former editions.

THE POINTS OF LAW, each independent of, and different from the other, which were frequently crowded together in ſucceſſion in the ſame Caſe, have been ſeparated and detached by BREAKS wherever the ſpaces of the page would afford the opportunity; by which means its appearance is rendered leſs confuſed, and the ſeveral points of law made diſtinguiſhable at firſt view.

AN ABSTRACT, containing the ſubſtance of each Caſe, has been drawn out into the margin, accompanied by references to all thoſe Caſes in the ſame book which relate to the ſubject of it.

THE MARGINAL REFERENCES of the laſt edition have been examined, and thoſe which were found inapplicable are expunged.

To theſe corrected references have been added, a new and numerous ſelection of references to all the ſubſequent Reporters from the reign of Charles the Second to the preſent time, and to ſuch treatiſes on particular ſubjects of law as have been diſtinguiſhed by their merit and authenticity.

THE STATUTES by which any parliamentary alterations have been made in the law ſince the publication of the laſt edition, are cited at the bottom of each Caſe.

AMONG the notes and references will be diſtinguiſhed ſeveral which were made from the manuſcript of the late LORD CHIEF BARON PARKER, in a copy of this work, which has been communicated to the Editor for this purpoſe.

THE EDITOR takes this opportunity to aſſure thoſe gentlemen whoſe frequent correſpondence has flattered him by a diſcovery of their impatience for the publication of this work, that the long delay has not been occaſioned by any neglect on his part, but has ariſen from many difficulties, which it was impoſſible to foreſee or prevent, in paſſing the work through the preſs.

THE ſucceeding Volumes of Caſes in the reigns of James the Firſt and Charles the Second are in great forwardneſs, and will be publiſhed as ſoon as poſſible.

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Hilary Term,

24. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.* (*a*) } *Juſtices.*
John Jeoffries, *Eſq.* } *Juſtices.*
John Clinch, *Eſq.* } *Juſtices.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

(*a*) See Co. 2. Lit. 3.

Vernier ——— More

Foſter and Peacock *againſt* Jo. Leonard,

Hilary Term, 23. Eliz. Roll 393.

Case 1.

ATTACHMENT upon prohibition againſt the defendant, farmer of the parſonage of *Sevenoak* in *Kent*, for ſuing for tithes of great wood, by the name of *ſilva cædua*, againſt the 45. *Edw.* 3. c. 3. The defendant pleaded, that for 300 loads of the trees, they were of birch, of which by law he ought to have tithes as *ſilva cædua*; and as to the reſt, which were of oak and elm, they were under the growth of twenty years. Upon the firſt it was demurred in law, and upon the ſecond plea they were at iſſue. After argument upon the firſt point by CLERK and WEEKS of the one ſide, and by FULLER and TANFIELD of the other, it was adjudged for the defendant, that he ſhall have tithes of birch; for birch is not ſuch wood as the ſtatute intends by the name of *groſs bois*, for it is intended of ſuch wood as ſerveth for building, and other uſes of a high nature, and not only for fuel, as the nature of birch is. And of oak and elm cut down before the age of twenty years, tithes ſhall be paid; for until that age they are not of ſuch value as the law regardeth for the purpoſes aforeſaid. Therefore, as to the birch, it was awarded he ſhould have a conſultation; he having entered a *non vult ulterius proſequi* for the reſidue.

Oak and *elm* tilled before they are of twenty years growth, and *birch* of any age are tythable. Poſt. 55.

Moor, 907. 1. R. Abr. 640. 2. Inſt. 643. Plowd. 470. 1. Brownl. 94. Hob. 219. Cro. Jac. 199. Bunb. 98. 12. Mod. 524. 3. Burr. 1310.

The Biſhop of Norwich *againſt* Pricket.

Case 2.

ACTION *de ſcandalis magnatum* was brought by the plaintiff for theſe falſe and ſcandalous words, *viz.* "You" (*prædictum epiſcopum innuendo*) "have writ a letter to me, which I have to "ſhew, which is againſt the word of God, againſt the queen's "authority, and to the maintainance of ſuperſtition, and that I "will ſtand to prove againſt you." They were at iſſue; and at the trial at *niſi prius*, the defendant confeſſed he ſpoke the words, whereupon a writ was awarded to enquire of damages, which were found to 500 marks. At the *day in bank*, the Court was not adviſed to give judgment, and the parties were adiourned. Afterwards, upon good deliberation, it was awarded that the biſhop ſhould recover the 500 marks, and eight pounds for coſts.

Scan. mag. lies for charging a Biſhop with heterodoxy in religion. Poſt. 67.

1. Leon. 336. 2. Mod. 160. 4. B. Abr. 406.

Norwich *againſt* Prickett.

Afterwards the biſhop releaſed part of the coſts.—Nota, This caſe was taken out of the record which was entered *Hilary*, 24. *Eliz. rot.* 39.

Case 3.

Boxe's Caſe.

Words actionable. S. C. Winch. 40. Poſt. 214. 878. Ld. Raym. 710. Strange, 142. 1. C. Dig. 184. 2. Term Rep. 475.

ACTION for theſe words, "Thou art burnt and haſt the "Pox!" After verdict, it was alledged that the action doth not lie, for it is not ſaid he had the French Pox, but it may be intended the *Small-Pox*; and for ſaying he had the Pox generally, no action lieth. But Wray ſaid the action lieth; for when it is ſaid, "Thou art *burnt* and haſt the *Pox*," it ſhall be intended the French Pox, which uſually cometh of *burning*; and it was adjudged for the plaintiff.

Vide 21. Jac. 1. c. 16.

Case 4.

Foſter *againſt* Pitfall.

Lands deviſed by a huſband to a wife in tail general, with remainder to *a ſtranger*, are not within 11. Hen. 7. c. 20. Poſt. 24. 514. 524. S. C. 1. Leon. 261. Co. Lit. 366. 4. Co. 4. 2. Vern. 489. Plowd. 30. Palm. 217. Cro. Jac. 173. Com. Rep. 369. 2. Bac. Abr. 92. in notis. Cruiſe on Recov. 158.

EJECTIONE FIRMÆ. The caſe was, one *Brook* deviſed land to his wife in tail, the remainder over to another, and dieth. The wife with her ſecond huſband aliens this land by fine and dieth. The queſtion was, If the ſon of the *feme* may enter upon this alienation, by the 11. *Hen.* 7. c. 20.? And all the Juſtices held that it is directly within *the words* of the ſtatute, for that goeth to all eſtates in tail, or for life, of the lands of the huſband, or given by the anceſtor of the huſband. But Wray, C. J. Clench, and Gawdy held, that this caſe is not within *the intent* of the ſtatute, for the ſtatute is only intended of lands given by the huſband, or his anceſtor, for the advancement of the wife; and although this caſe is within the words, yet it not being within the intent of the ſtatute, the ſtatute does not extend to it; and vouched *Eaſton v. Studdes* (*a*). The remainder of this land is limited to a ſtranger, and ſo ſhall not be intended to be for a jointure, where no inheritance is reſerved to the baron or his heirs: and the meaning of the ſtatute is, that ſhe ſhall not prejudice the heirs of the baron, that the land ſhall not deſcend to them; but here, upon her alienation nothing reverteth or deſcendeth to the heir of the huſband, and ſo is clearly out of the ſtatute.—Nota, It was adjudged, 21. *Eliz.* that if the baron be ſeiſed of land in right of his wife, and they levy a fine, and the conuſee grants a rent to them in tail, the baron having iſſue, dieth, the *feme* alieneth the rent, this is out of 11. *Hen.* 7. c. 20. (*b*) for the rent cometh in lieu of the land.

(*a*) Plow. 459. (*b*) Confirmed by 32. Hen. 8. c. 36.

Case 5.

Lord Norrice *againſt* The Marquiſs of Wincheſter.

A. tenant in tail, remainder to *B.* *A.* ſuffers an erroneous recovery. The common vouchee releaſes. If *A.* die without iſſue, *B.* may reverſe it by writ of error.

ERROR to reverſe a common recovery had by the anceſtor of *the Lord Marquiſs* againſt *Lionell Norrice*, who was tenant in tail, the remainder to the plaintiff. The defendant pleads a releaſe of all errors by *Thomas Chapipan* the laſt vouchee, and the common vouchee, and demands judgment, &c. Plowden, *for the defendant*, argued, that all the burden lieth upon the laſt vouchee, for he is to make recompence to all, and therefore he is to bring error, and ſo he may releaſe errors, and bar all others; and ſo it is adjudged 17. *Edw.* 2. "*Error*" 90. But all the Juſtices

Raym. 93. Skin. 247. Comb. 8. Salk. 260. 2. Bac. Abr. 553. Cowp. 702. 1. Term Rep. 738.

reſolved

reſolved the contrary, for the common vouchee is put in only for form, and in truth he renders nothing; and therefore it is againſt reaſon that his releaſe ſhould bar others that have the loſs, and are entitled to have remedy by the reverſal of the judgment. —GAWDY. If execution be ſued againſt the common vouchee, ſo that he renders in value, then upon ſuch an averment, the loſs lying upon him, his releaſe ſhall bar the others *(quod* WRAY *conceſſit)*; but here he renders nothing, and therefore ſhall releaſe nothing. They all agreed that the caſe of 17. *Edw.* 2. was not law; and it was adjudged that the releaſe was no bar.

NORRICE *againſt* WINCHESTER.

1. P. Will. 536. 2. P. Will. 119. 3. P. Will 206.

Green's Caſe.

CASE 6.

EJECTIONE FIRMÆ. The caſe was, a prebend let land to *Green* for years, rendering rent, and a re-entry for non-payment. The rent was demanded and was not paid, and two days after the leſſor received the rent of him, and maketh him an acquittance by the name of his fermor: and if this receipt doth bar him of his re-entry, was the queſtion. And it was clearly reſolved that the bare receipt of the rent after the day was no bar, for it was a duty due to him; but a diſtreſs for the rent, or a receipt of the rent due at another day, was a bar, for thoſe acts do affirm the leſſee to have lawful poſſeſſion: ſo if he maketh him an acquittance, with a recital that he is his tenant; and in this caſe by calling him his fermor, it is a full declaration of his meaning to continue him his tenant; and it was adjudged that the entry was not lawful.

If a *leſſor* receive *rent*-arrear by any act affirming the leſſee's poſſeſſion, it bars his right of re-entry for non-payment on the day it was due. Poſt. 210.

1. Leon. 262. 3. Co. 64. b. Co. Lit. 211. b. 215. a. Cowp. 243. 482. 803.

Dougl. 57. 1. Term Rep. 161. 2. Term Rep. 425.

Tanfield's Caſe.

CASE 7.

IT was agreed by all the Juſtices in the common pleas, that the grantee of an annuity for years cannot have an action of debt for the arrearages during the term in the annuity.

Debt by grantee of annuity. Vide poſt. 268. 895. Yelv. 208.

Swann's Caſe.

CASE 8.

IT was *ſaid* to be adjudged, that in covenants perpetual, if they be once broken, and an action of covenant brought, and a recovery upon it, if they be afterwards broken, a *ſcire facias* ſhall be had upon the judgment, and need not bring a new writ of covenant.

Scire facias.

1. Wood, 395. 2. Bl. Rep. 844. 1. Term R. 388.

Valentine Hyde *againſt* Hill.

CASE 9.

EJECTIONE FIRMÆ. It was held upon evidence, that if baron and feme Engliſh go beyond ſea without licence, or tarry there after the time limited by the licence, and have iſſue, that the iſſue is an alien *(a)*, and not inheritable, contrary to the opinion of HUSSEY, 1. *Rich.* 3. *pl.* 4.

Iſſue born abroad are aliens.

Cro. Car. 602. 7. Co. 18. Vaugh. 279. 1. C. Dig. 297.

(a) By 29 Car. 2 c. 6. children born of Engliſh *parents* out of the King's dominions are declared to be *natural-born ſubjects*; and by 7. Anne, c. 5. *the children* of all *natural-born ſubjects*, born out of the King's allegiance, ſhall be deemed natural-born; but by 4. Geo. 2. c. 21. this is confined to ſuch children whoſe fathers at the time of their birth are natural-born ſubjects of *Great Britain*, and not liable to the penalties of treaſon or felony in *England* or *Ireland*, or in the ſervice of an *alien enemy*. And the privileges of 7. Ann. c. 5. thus explained by 4. Geo. 2. c. 21. are extended by 13. Geo. 3. c. 21. to all children born out of the King's allegiance, whoſe fathers are *intitled* to the rights of *natural-born ſubjects*. See alſo 12. and 13. Will. 3. c. 2. ſ. 3. and 25. Geo. 2. c. 39.

Eaſter Term,

24. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Jeoffries, *Eſq.* } *Juſtices.*
John Clinch, *Eſq.* }
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Eccleſtade *againſt* Maliard.

An award cannot order any act to be performed by a ſtranger. Poſt. 70. 432.

10. Co. 131. b. 2. Saund. 337. 2. Lev. 6. 235. 1. Salk. 74.

DEBT, upon an obligation to ſtand to the award of *J. S.* who awarded that one of the parties ſhould pay to *the ſon* of the other party 5l. which was bequeathed to him; and for not payment, action was brought; and it was adjudged that the action did not lie, for he was not bound to pay or tender the money, being a ſtranger to the award. In *Mich. Term*, 18. *and* 19. *Eliz.* it was adjudged between *Henry Norwich* and *Simon Norwich*, that, where they were mutually bound to ſtand to the award of *Sir Edward Montague*, of all demands, &c. who awarded that *Simon Norwich*, with three ſureties, ſhould be obliged to *Henry Norwich* for the payment of a certain ſum, it was a void award; for the arbitrator had no authority to award any thing concerning a third perſon: but in that caſe it was ſaid, if the award had been to pay 10l. to *J. S.* or that the party ſhall be non-ſuited, or diſcontinue an action, it had been a good award, for they are acts to be done by the party himſelf; and if he tendereth the 10l. to *J. S.* and he refuſeth, or offers to be nonſuit, or diſcontinue the action, and the court refuſeth, the obligation is ſaved, but he ought to plead tender of payment, and offer to be nonſuited, &c. *Vide* 22. *Hen.* 6. 46. 17. *Edw.* 4. 5. 18. *Edw.* 4. 22. *and* 19. *Edw.* 4. 1.

CASE 2.

Margaret Marſhall's Caſe.

A general pardon may be aſſigned as error to reverſe an outlawry, if the party had not an opportunity of pleading it. Poſt. 25.

(*a*) *Quære.* Vide 3. Inſt. 231. 6. Co. 11. 2. R. Abr. 306. Hob. 283. 1. Sid. 55. 2. Hawk. 573. Strange, 197.

ERROR, to reverſe an outlawry in petty treaſon; and alledgeth, that whereas the offence was committed in the reign of queen *Mary*, that 1. *Eliz.* a general pardon was made of all treaſons and felonies, that notwithſtanding 3. *Eliz.* ſhe was waived for this treaſon.—THE COURT ſaid that the pardon was not general, and that they were not to take notice of it, if the party doth not take advantage of it; but it was held that ſhe may have a writ of error upon this matter (*a*), becauſe ſhe had no day in court before to plead this matter, but always made default: as if one hath a releaſe to plead, and upon a *ſcire facias* he is returned *nihil*, ſo as he never had day to plead it, if judgment be given upon his default, he ſhall have an *audita querela*; but if he had been returned, "*warned*," and appeared, and did not plead it, and judgment is given, he hath no remedy upon the releaſe.

The

The Lord Montague *againſt* Sheppard.

CASE 3.

TRESPASS. It was held by the Court, that a tenant by copy of court roll cannot by the common law take trees for houſe-boot, hedge-boot, and cart-boot, &c. as tenant for life or years may do which have an eſtate certain; but a copyholder hath not this liberty, except by ſpecial cuſtom, and ſuch cuſtoms are in many manors, and are good.

Gilb. Ten. 236. 1. B. Abr. 485. Ld. Ray. 551. 3. Term Rep. 391. 746.

Copyholder. Poſt. 292. 499. 631. 2. Salk. 638. Com. Rep. 71. 11. Mod. 18. 12. Mod. 379.

Vaſt *againſt* Gawdy.

CASE 4.

DEBT upon an eſcape againſt the defendant, guardian of the Marſhalſea, for ſuffering *T. B.* who was in execution at the plaintiff's ſuit, to eſcape. The defendant pleads that he did not ſuffer him to eſcape; and gave in evidence that the ſaid *T. B.* brought an attaint (*a*) to reverſe the judgment; and upon his prayer the Court did bail him, that he might proſecute his attaint *cum effectu*: but this bail was not entered upon record.—It was held by WRAY, C. J. and the other Juſtices, that the evidence was good, and that the Juſtices by their authority may diſcharge the party of the execution, and do it upon good conſideration; and the Juſtices uſe to command the marſhal to bring the priſoner before them to their chambers, and it is a good diſcharge for him: for the marſhal of himſelf cannot ſuffer the priſoner to go out of his houſe by *baſton* or otherwiſe; but by the command of the Juſtices he may remove him, although it be to another county, and it is no eſcape. The eſcape ſuppoſed here is for letting him to go by bail, which is the act of the Court and not of the marſhal, and may well be given in evidence. WRAY ſaid, that upon execution ſued after verdict, although the party ſues an attaint, the Court uſually doth not bail him; for the verdict is intended true 'till reverſed; but ſometimes the Juſtices upon good conſideration will bail him: and here although the bail be not entered, yet the plaintiff for his benefit may cauſe it to be entered, and then he may have a *ſcire facias* upon the bail, and ſo is not at any miſchief. And afterwards the plaintiff was nonſuited.

To enable a defendant in execution to proſecute an *attaint*, the king's bench have a diſcretionary power to admit him to bail: and it will exonerate the gaoler from *eſcape*, tho' not entered on record. Dyer, 193. Cro. Car. 14. 3. Co. 44. a. Cowp. 63.

(*a*) The writ of attaint is now rendered obſolete, by the practice of granting new trials on motion. 3. Bl. Com. 403. 3. Burr. 393. Poſt. 309. in notes.

The Counteſs of Suſſex *againſt* Wroth.

CASE 5.

THE caſe was, land was aſſured by the *Earl of Suſſex*, by act of parliament, to his wife for her jointure, the reverſion in fee to the earl, of the manor of *Burnham*, with a PROVISO for the earl to make leaſes for one and twenty years, rendering the ancient rent. The earl makes a leaſe for one and twenty years, rendering, &c. and before the end of it makes another leaſe by indenture to the leſſee for one and twenty years, bearing date 30th March, to commence at Michaelmas following. It was adjudged a void leaſe, becauſe for the time it is a leaſe in reverſion; and if he might make a leaſe to commence at the Michaelmas following, he might make it to commence twenty years after. The ſtatute intended not to give him that liberty; and it being a liberty and power, it muſt be ſtrictly purſued. The land was aſſured to the counteſs for her jointure, which is favoured in law; and if the earl might make leaſes one after the other, ſhe ſhould never have benefit of her jointure; which the ſtatute did not intend.

Conſtruction of powers. Palm. 468. 6. Co. 33. 8. Co. 69. 1. Leon. 35. 3. Leon. 130. 4. Leon. 61. 64. Poph. 9. Yelv. 222. Cro. Jac. 318. 3. Bac. Ab. 416. 1. Ld. Ray. 269. P. on P. 411. Cowp. 260. 266. 714. Dougl. 53. 293. 565. 1. T. Rep. 705. 2. T. Rep. 241. 380. 781.

Trinity Term,

24. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Jeoffries, *Eſq.* } *Juſtices.*
John Clinch, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Edwards' Caſe.

It is ſlander to charge a man with *an intent* to do an unlawful act.—Poſt. 191. 250. 308. 349. 569. 618. 868. Yelv. 58. 2. R. Ab. 454. 1. Strange, 194.

ACTION for theſe words, "*Jo. Edwards* did wrap gunpowder in a piece of tow, and laid it under my window, and put fire to it, *minding* to burn my houſe."—WRAY, C. J. held that the words are actionable; for by ſuch ſpeech the plaintiff's good name is impaired: ſo to ſay, "he lay in wait in the highway *intending* to murder me." And the plaintiff had judgment.

CASE 2.

Dorrell *againſt* Collins.

An exception in a leaſe, which goes to the whole thing demiſed, is void. Poſt. 244. Hob. 170. 1. Wood, 242. 8th. Touch. 75.

EJECTIONE FIRMÆ. Upon not guilty, the jury found that the maſter and ſcholars of the college of *Sinkford* were ſeiſed in the time of *Hen.* 8. of the manor of *Hodley*, of which the place, &c. is parcel, and let all their lands in *Lambehurſt* (except the manor of *Hodley*, in *Kent* and *Suſſex*) to *J. S.* for years: and they further find, that the maſter and ſcholars had no other lands in *Lambehurſt* than the ſaid manor.—The queſtion was, if the manor paſſeth by the leaſe? And all the Court held, that it being found they had no other land than the manor, the exception is void, becauſe it goeth to the whole thing demiſed; otherwiſe of an exception of part.

In conveying an intereſt under an adminiſtration granted by an Archbiſhop, it need not be ſhewn *how* adminiſtration was granted. Poſt. 402. 431. 456. 838. 879. Cro Jac. 556. 3. Lev. 273.

BUT an exception was taken to the declaration, becauſe the plaintiff conveyed his intereſt by an adminiſtrator, to whom the *Archbiſhop of Canterbury* did grant adminiſtration of all the goods of the leſſee in *Kent* and *Suſſex*; but doth not ſhew *how* the *archbiſhop* granted it, either as ordinary or by his prerogative: and this was held by all the Court, a material exception. But it was afterwards alledged, that all the precedents, in this court and in the common pleas, were ſo in general, without ſpecial ſhewing *how*; and for that they would not change the precedents, they diſallowed the exception.

2. B. Ab. 442. 1. Salk. 38. 41. Dougl. 4.

A term held in *autre droit* will not paſs by a grant of "all *my* goods and chattels." Poſt. 164.

AND in this caſe it was held, that if an adminiſtrator doth grant *omnia bona et catalla ſua*, a term which he hath as adminiſtrator doth not paſs, for it is not *ſuum*, but he hath it in right of the inteſtate;

inteſtate: but if one hath a leaſe as executor or adminiſtrator of the manor of *D.* and he granteth all his right and intereſt in the manor, the term which he hath as executor doth paſs; for he had no other right in it, and his intent is to paſs it: but by general words it ſhall not paſs (*a*).

DORRELL *againſt* COLLINS.

(*a*) 2. L. Ray. 1306. Cro. Jac. 318. 1. Bro. Caſ. Ch. 127.

Teat's Caſe.

CASE 3.

DEBT upon an obligation. The condition of the obligation was, that if the obligor deliver to the plaintiff an obligation, in which he was obliged to the defendant, before ſuch a day, that then, &c. The defendant ſueth the plaintiff upon that obligation, and recovereth; and afterwards, before the day, he delivereth the obligation to him.—The queſtion was, If this was a performance of the condition?

A condition to deliver an obligation is not performed by the delivery of it after it has been put in ſuit, and judgment recovered on it. Poſt. 384. Moor, 709. Goldſ. 177. 1. Leon. 52. Sid. 48. Ray. 25. 3. Ba. Ab. 707. Bul. N. P. 161.

WRAY, C. J. and the other Juſtices held it was not: although the words were performed, yet the intent was not performed; for the intent was, he ſhould have the obligation for his diſcharge; which is not by the delivery of it at the day, for it is transferred *in rem judicatam*: and notwithſtanding the delivery of the bond, yet he may have benefit of the judgment.

1. Wood, 299.

Shelton's Caſe.

CASE 4.

THE caſe was, leſſee for years grants his term by deed, and ſealeth it in the preſence of divers, and of the grantee himſelf; and the deed at the ſame time was read, but not delivered; nor did the grantee take it, but it was left behind them in the ſame place.

Grant good without *actual* delivery. Poſt. 122. 356. Owen, 44. 95. Co. Lit. 36. 9. Co. 137. 1. Wood, 232.

The opinion of all the Juſtices was, that it was a good grant; for the parties came for that purpoſe, and performed all that was requiſite for the perfecting it, except an actual delivery: but it being left behind them, and not countermanded, it ſhall be ſaid a *delivery in law.*

Trinity Term,

24. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Thomas Meade, *Eſq.* } *Juſtices.*
Hugh Wyndham, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1. **Anonymous.**

What ſhall be a *ſuſpenſion*, and what an *extinguiſhment* of a copyhold. Poſt. 21. Moor, 185. Cro. Jac. 84. 4. Co. 31. b. See 1. Bac. Ab. 481, and the caſes there cited.

A COPYHOLDER in fee marrieth a woman ſeignioreſs of the manor, and they ſuffer a common recovery, to the uſe of themſelves for life, remainder over.

It was held by ANDERSON, C. J. MEADE, and PERIAM, that the copyhold was extinct; for by the recovery the baron had gained an eſtate of freehold; but they all held that by the intermarriage it was only ſuſpended. MEADE ſaid it was adjudged in *Newport's Caſe*, that if a copyholder takes a leaſe of the manor, his copyhold is extinct.

and 2. Bac. Ab. 451. Gilb. Ten. 305. 2. Term Rep. 705

CASE 2. **Tunbridge's Caſe.**

A diſtreſs for *damage feaſant* may be ſevered; but not for rent ſervice. Poſt. 549. 4. H. 6. pl. 7. Co. Lit. 47. a. 2. Keb. 596. 1. Sid. 440. 422. 1. Roll. Ab. 664. 1. Vent. 36. 2. Burr. 579.

TRESPASS for taking his horſes. The defendant juſtifieth for *damage feaſant*. The plaintiff replieth, that before the treſpaſs ſuppoſed, &c. he yoked the horſes, and tied them to the plough, and the defendant untied them, and took them, &c.

The opinion of the Court was clearly, that he may well ſever them for *damage feaſant*: for although they are an entire diſtreſs when annexed to the plough, and, as ANDERSON ſaid, if the plough or cart by chance fall upon a man, and kill him, as well the horſes as the cart, &c. are forfeited; yet in this caſe they may be ſevered.

MANWOOD ſaid, there is a difference in the books: when the diſtreſs is for rent-ſervice, there they cannot be ſevered; for they are an entire diſtreſs, and he claimeth no intereſt in the land, but only a rent or ſervice, with which the land is charged (*a*). But in a diſtreſs for *damage feaſant*, the party doth claim the land itſelf, and he may have ſeveral actions for treſpaſs for every horſe; for every one of them doth treſpaſs. And the plaintiff had day to amend his replication.

(*a*) See 2. Will. and Mar. c. 5. 8 Ann. c. 14. 4. Geo. 2. c. 28. and 11. Geo. 2. c. 19. Co. Lit.

Michaelmas

Michaelmas Term,

24. and 25. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt.* (a) *Chief Juſtice,* (a) Moor, 116.
Sir William Periam, *Knt.*
Thomas Meade, *Eſq.* } *Juſtices.*
Hugh Wyndham, *Eſq.*
Sir John Popham, *Knt.* *Attorney General.*
Sir Thomas Egerton, *Knt.* *Solicitor General.*

Bennet's Caſe.

CASE 1.

COVENANT. The caſe was, *A.* did covenant with *B.* to make ſuch aſſurance as his counſel ſhould adviſe. The queſtions were two: *Firſt,* If *B.* muſt give notice? *Secondly,* What notice was ſufficient?

In what manner a conditional covenant ſhall be performed. Poſt. 97. 298. 404.

THE COURT held clearly that *B.* muſt give notice of the aſſurance, for otherwiſe *A.* doth not know his counſel or their advice; and *B.* is not only to ſhew him the aſſurance that he is to make, but is to permit him to read it, and to go to his own counſel to conſider it; and *A.* is to have convenient time after the aſſurance ſhewn him, to perfect it.—ANDERSON, C. J. ſaid, that if *B.* himſelf doth deviſe the aſſurance, and make it, *A.* is not bound to perform it; for he is only to make the aſſurance that the counſel of *B.* ſhall adviſe, and not that which *B.* himſelf ſhall deviſe; and it is a good plea, that *concilium non dedit adviſamentum.* 6. *Hen.* 7. *pl.*

5. Co. 19, 20. 2. Co. 3. b. Moor, 143. 183. Dougl. 685. 1. Term Rep. 638. Onſlow's N. P. 159.

Anonymous.

CASE 2.

ANDERSON, C. J. ſaid, that if one deviſe land to *J. S.* in fee, and after by the ſame will deviſe that land to *J. D.* for life, both parts of the will ſhall ſtand; and in conſtruction of law, the deviſe to *J. D.* ſhall be firſt. So if a deviſe be to *J. S.* in fee, and afterwards, in the ſame will, the land be deviſed to *J. D.* in fee, they are joint-tenants.

A deviſe of the ſame land to *A.* for life, and by the ſame will to *B.* for life, or to *A.* in fee, and then to *B.* in fee, creates a joint-tenancy. Poſt. 217. 538. 431. Co. Lit. 112. 8. Co. 95. Yelv. 210. Plow. 541. Cro. Jac. 49. 3. Leon. 11. Str. 117.

MEADE ſaid, that caſe had been often moved, and always ruled, that the deviſe is good to them both, and they ſhall take as tenants in common, or at leaſt as joint-tenants. And ANDERSON ſaid, and it was agreed by the whole Court, that if a termor deviſeth to *J. S.* ſo much of his term as ſhall be arrear at the time of his death, this is a good deviſe for ſo much of the term as remaineth at his death; and the caſe in *Brooke* is good law.

Clay's

Case 3.

Clay's Case.

Writs, viz. of partition, which command a sheriff to do an act in his own person, cannot be executed by deputy; and the fact may be inquired into before the return is filed.

A WRIT OF PARTITION being awarded, the Court was informed that at the time of the partition made, the sheriff was not upon the land in person, as he is to be; and it was prayed that the writ should not be received, but a new writ awarded.

The opinion of MEADE, WYNDHAM, and PERIAM was clear, (ANDERSON, C. J. *being absent*), that they may well examine this matter before the return and filing of the writ; and thereupon they examined the under-sheriff, and he confessed that he was there, but not the sheriff himself; and thereupon the writ was staid, and a new writ awarded. And they held the same law was in all cases where the words of the writ are, "that the "sheriff shall go in his own person," as in an *accedas ad curiam*, *waste*, *redisseisin*, if exception be taken at bar before the return of them be received: but if the sheriff in such writ returneth, that he was there in proper person, and this return be received, and the writ filed; then the Court cannot examine it, for the return is good, and the party can have no averment against the return, nor can have error. And MEADE said, he had seen it so ruled as here.

1. Jones, 389. Booth, 245. Lit. s. 248. Co. Lit. 167. 11. Hen. 4. 7. 6. Co. 12. Hob. 13. Jenk. 181. 8. Co. 52. 4. Co. 65. Dyer, 204. 2. Inst. 390.

Dalt. 34. F. N. Br. 128. c. Sed vide 2. P. Wms. 92.

Case 4.

Anonymous.

A grant to *A.* for life with remainder to his children is good, tho' neither the children nor the word remainder be named in the deed.

SNAGG, *serjeant*, moved this case. An abbot and convent, by deed indented under their common seal, granted to baron and feme, being tenants for years in possession, that they shall have the lands for their lives; and granted further by the same deed, that after their deaths their children should have the land for forty years.

The question was, If the children take any benefit of this grant, not being parties to the deed? And by the opinion of MEADE, WYNDHAM, and PERIAM, clearly, they shall take by way of remainder, although there be no word of remainder in the deed; and as a remainder they may take, though they be not parties to the deed.

Post. 121. 334. 742. Plowd. 159. Dyer, 125. Co. Lit. 9. 1. Roll. Rep. 319. 1. Wood's Con. 213.

Case 5.

Anonymous.

An action *on the case* lies for setting fire to a house by mischance, and not an action *on the custom*.

SNAGG moved this case, and demanded the opinion of the Judges in it. *J. S.* with a gun at the door of his house shoots at a fowl, and by this fireth his own house, and the house of his neighbour; upon which he brings an action on the case generally, and doth not declare upon the custom of the realm, as 2. *Hen.* 4. *viz.* for negligently keeping his fire.

The question was, If this action doth lie? And all the Court held it did; for the injury is the same, although this mischance was not by a common negligence, but by misadventure: and if he had counted upon the custom of the realm, as 2. *Hen.* 4. the action had not been well brought; yet *consuetudo regni est communis lex* (*a*).

3. Lev. 359. 1. Salk. 19. Carth. 202. Dougl. 668.

(*a*) Vide 6. Ann. c. 31.

Kinguel

Kinguel *againſt* Jo. Knapman.

Case 6.

DEBT upon a bond. The condition was, that "whereas there "were divers controverſies between the plaintiff and *Jo.* "*Knapman*, and a ſtranger, the plaintiff and the ſaid *J. Knapman* "ſubmitted themſelves to the award of *John Coxſin*; and the de- "fendant bound himſelf in two hundred pounds to the plaintiff, "that *Jo. Knapman* ſhould perform the award on his part," &c. The arbitrator awarded, that the ſaid *Jo. Knapman* ſhould pay to the plaintiff thirty pounds, *viz.* twenty pounds at Eaſter, and ten pounds at Michaelmas next. The defendant pleads payment of the twenty pounds at Eaſter; and as to the ten pounds, that the ſaid *Jo. Knapman* died before Michaelmas: upon this it was demurred.

An executor is bound to perform an executory order in an award againſt his teſtator, although the time of performance does not happen till after his death. Poſt. 277.

The queſtion was, If by the death of *Jo. Knapman* the obligation was diſcharged? And it was argued by Beaumont that it was not, for the ten pounds was a duty to the plaintiff which was to be paid, and the executor may perform it; and the executor is to pay it, although not named, as he ſhall take advantage of a thing done unto or by the teſtator. *Bar.* 216. 45. *Edw.* 7. *Dalton's Caſe in the Commentaries.* 10. *Hen.* 7. *pl.* 18. But if it be a thing which is not in their power, it is otherwiſe; as to make a feoffment. 14. *Edw.* 3. *pl.* 4.—Heal *contra.* For the performance of the award was a thing collateral, as 19. *Hen.* 8. *pl.* 17. 17. *Edw.* 4. And here the defendant that is obliged is a ſtranger; and it is not material, though it be in the power of the executor to perform it. 38. *Hen.* 6. *pl.* 2. 27. *Hen.* 8. *pl.* 16.

Cro Jac. 300. 2. Leon. 155. 1. Wood's Con. 313.

But all the Juſtices held the obligation was forfeited; but they would not give judgment, becauſe the penalty was great for ſuch a ſmall duty (*a*).

(*a*) For the kind of actions which ſurvive againſt an executor, ſee Cowp. 375.

Browne *againſt* Daukes.

Case 7.

ACTION FOR WORDS. "Thou art a pillory knave: re- "member, *Browne*, thou ſhouldſt have been ſet on the pillory." And the plaintiff had judgment, though it was not ſaid he was ſet upon the pillory (*b*).

Words actionable.

(*b*) Sed vide poſt. 31. contra.

Hilary

Hilary Term,

25. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Thomas Meade, *Eſq.* } *Juſtices.*
Hugh Wyndham, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Foljamb's Caſe.

CASE 1.

An aſſiſe abated for the not coming of the juſtices on the adjournment day. 4. Hen. 7. pl. 8. Theol. bk. 12. c. 8. Dyer, 226. Co Lit. 135. 2. Hawk. 426. Dougl. 45. 2. Ter. Rep. 731.

AN ASSISE being arraigned before JUSTICE MEADE in his circuit, and being adjourned to the ſecond Saturday in *Michaelmas Term* to Serjeant's-Inn in Fleet-ſtreet; and day being then given to anſwer, that term was kept at *Hertford*, and a day was given to the party to anſwer the ſecond Saturday in *Hilary Term*. Being now moved, it was held clearly, that the aſſiſe was diſcontinued by the not coming of the Juſtices the firſt day, and the party is put to a re-ſummons againſt the jurors, and a new attachment againſt the defendant, and to begin of new to arraign his aſſiſe. 25. *Aſſ.* 5. *Keilw.* 2. *Brooke* "*Diſ. de Pro.*" 29.

CASE 2.

A ſheriff is not diſcharged from his office until the new patent is ſhewn to him. Poſt. 366. 440. Moor, 186. Dougl. 463.

(a) See 3. Geo. 1. c. 15. and 20. Geo. 2. c. 37. ſ. 2.

Fitz's Caſe.

DEBT againſt him as ſheriff of *Devon*. FRANCIS GAWDY, *ſerjeant*, ſhewed the truth of the caſe to be, that upon a recovery in debt againſt *A.* a *capias ad ſatisfaciendum* was awarded to *Sir John Clifton*, then ſheriff. A new patent was made to *Mr. Kircombe*; and afterwards, and before notice, *Sir Jo. Clifton* arreſted *A.* and left him in execution. *Kircombe* dieth (*a*), and *Mr. Fitz* was made ſheriff, and let *A.* go at large. The queſtion was, If it were a good arreſt by *Sir Jo. Clifton?* for if it were not, it was no eſcape.—THE COURT held clearly, that the arreſt was good, and it was an eſcape; for *Sir Jo. Clifton* remained ſheriff, and is not diſcharged of his office until the new patent is ſhewn to him, ſo as he may have notice of his diſcharge: and if in the mean time, between the ſealing of the new patent and the ſhewing of it to him, he keeps a county court, it is good.

CASE 3.

Succeſſion to a peerage *tempore parliamenti*, does not determine the office of ſheriff. Poſt. 366 2. C. Dig. 582. 4. B. Ab. 435. Dougl. 45. 2. Term Rep. 731.

Sir Lewis Mordant's Caſe.

MEMORANDUM, He was ſheriff of the counties of *Bucks* and *Bedford*. *Lord Mordant* his father died 20th April, *tempore parliamenti*. It was held by all the Juſtices, and the attorney and ſolicitor of the queen, that his office by this matter is not determined, although he be now a baron of parliament, and that he yet remaineth ſheriff *ad voluntatem reginæ*. *Dyer's Manuſcript*, 13. *Eliz.*

CASE 4.

Ejectment. Poſt. 884. Yelv. 166. 1. Brownl. 145. 1. Sid. 239.

Guy *againſt* Rand.

EJECTIONE FIRMÆ. The plaintiff declared of an ejectment of one hundred acres of land, and ſhewed his leaſe in evidence only of forty acres; and it was ſaid he had failed of his

Cwen 133. 3. Lev. 334. 1. Burr. 330. 5. C. Dig. 167. 3. Term Rep. 16.

leaſe, for there was no ſuch leaſe as that of which he did count. But it was ruled to be good for ſo much as was compriſed in his leaſe; and for the reſidue, the jury may find the defendant not guilty.

GUY *againſt* RAND.

Wrenche's Caſe.

CASE 5.

DEBT upon an obligation. The condition was, to ſtand to the arbitrement of *J. S.* of all cauſes then depending, ſo as the award be made before, &c. in writing. The defendant pleads no arbitrement. The plaintiff ſhewed that *J. S.* did award, &c. that the plaintiff ſhould releaſe to the defendant an action of account then depending, and for that the defendant ſhould pay to the plaintiff ten pounds, and this was delivered in writing, &c. and the defendant had not paid, &c. Iſſue was taken upon the arbitrement, and found for the plaintiff.—PLOWDEN moved in arreſt of judgment, that the ſubmiſſion was of all actions then depending between them, and the award was, that the plaintiff ſhould releaſe an account then depending; which is to be intended at the making of the award, and not at the time of the ſubmiſſion, and ſo plainly out of the ſubmiſſion, and ſo no good arbitrement.—The Court commanded judgment ſhould be ſtaid, till the other party anſwer it.

Variance between the ſubmiſſion and the award. Poſt. 861. Cowp. 178. 766. 1. Term Rep. 240.

Anonymous.

CASE 6.

FLOWERDEW, *ſerjeant*, moved this caſe. A proceſs iſſued againſt *J. S.* to arreſt him; he keeps his houſe to ſave himſelf from arreſt, and afterwards goeth out to the market and to other places; and when he heareth again of a new proceſs out againſt him, he keeps his houſe, and afterwards goeth at large. The queſtion was, If he were within the ſtatutes of bankrupts (*a*)? And all the Court held he was not (*b*), becauſe he uſe to go at large; and it might be, that his policy would not prevent the ſerving of the proceſs; for he might be met withall unwittingly.

Keeping houſe is no act of bankruptcy, if the party go afterwards at large.

(*a*) See 13. Eliz. c. 7. 7. Jac. 1. c. 15. 5. Geo. 2. c. 30.

(*b*) Sed vide

Salk. 110. Strange, 809. Bull. N. P. 39. 1. Atk. 201. Cook's B. L. 72. 2. Term Rep. 59. contra.

Lawrence *againſt* Netherſale.

CASE 7.

TRESPASS. The ſheriff returned in common pleas, that the defendant was attached *per catalla ad valentiam* ten pounds, and it was adjudged a void return; for he ought to return that he was attached by one beaſt or chattel certain, and name them, ſo that they may be forfeited; for upon ſuch general return, none of them can be forfeited.

The ſheriff's return muſt ſpecify the *things* attached. Carth. 225. Lutw. 1457. 2. Salk. 589. 2. Term Rep. 155.

Anonymous.

CASE 8.

IF one taketh *trop petit diſtreſs* for rent, and after taketh another diſtreſs for the ſame rent, this is not good; for he cannot avow two diſtreſſes for the ſame rent, for it was his folly that he took not a better diſtreſs at the firſt. But in the *Abridgement of the Aſſiſes* it is ſaid, that if there be not ſufficient diſtreſs when he diſtrained, he may diſtrain again (*a*).

A man cannot take two diſtreſſes for the ſame rent if there be ſufficient at firſt. 1. Mod. 71. 288.

L. Ray. 205. 1. Vent. 104. Fitzg. 85. Moor, 7. Bro. Diſ. 98. 3. Com. Dig. 115. 2. Bac. Abr. 115. 3. Bl Com. 12. 1. Bur. 580. 590.

(*a*) By 17. Car. 2. c. 7. where cattle are diſtrained, and there are not ſufficient to ſatisfy the arrears, the party, &c. may diſtrain from time to time.—See alſo 1. and 2. Phil. and Mary, c. 12. and 2. Will. and Mary, ſeſſ. 2. c. 5. and Onſlow's N. P. 54.

Eaſter Term,

25. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Thomas Meade, *Eſq.* } *Juſtices.*
Hugh Wyndham, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Hawley *againſt* Simpſon.

In what caſe a tender before the day is good. Poſt. 73.

DEBT upon an obligation. The condition was, to pay at or before the 29th of September next, at ſuch a place, ten pounds to the obligee. It was held by the court, that if the obligor tender the money the 28th day of September at the place, and the obligee is not there to receive it, it is a void tender; for the tender is to be the laſt day: but if the obligor meet the obligee at the place before the day, and he then tender it, this is ſufficient; and the obligee ought to receive it.

Co. Lit. 211. a. 10. Co. 129. a. Moor, 122. 602. 8. Co. 92. 2. Bulſt. 144. Yelv. 37. Cro. Jac. 9. 13. Co. 2. Roll. Rep. 373. 5. Bac. Abr. 9. Ld. Raym. 621.

CASE 2.

Sir William Drury's Caſe.

A releaſe dated before, but made and delivered after an obligation, does not releaſe the obligation. 2. Roll. Ab. 410. Dyer, 56. 307. 1. Wood's Con. 233.

J. S. makes an obligation, dated and delivered the firſt of May; and upon the firſt of June following, the obligee maketh a releaſe to the obligor, bearing date the firſt of March, and delivered the firſt of June, by which he releaſeth all actions *ab origine mundi* until the date of the releaſe. And all the Juſtices were of opinion, that the obligation was not releaſed.

2. Roll. Rep. 255. Palm. 218. 2. Brownl. 300. 2. Mod. 280. 3. Mod. 182.

CASE 3.

The Earl of Bedford's Caſe.

If a defendant juſtifies as bailiff to another when he is not ſo, the plaintiff may reply *de ſon tort demeſne*, and ſo puniſh him. Poſt. 540. 8. Co. 67. a. 1. Vent. 314. 2. Lev. 210. 3. Lev. 20. Salk. 107.

REPLEVIN. The defendant made cogniſance as bailiff to the EARL OF BEDFORD; whereas in truth he was not his bailiff, but took the diſtreſs againſt *his* will. It was held that the plaintiff cannot traverſe that he was not his bailiff, for it is not iſſuable; nor can the earl diſavow it, for he is not party; nor can the earl have an action on the caſe, becauſe he is not damnified: but the party whoſe cattle are taken may bring an action of treſpaſs for taking his cattle; and if the defendant juſtifieth as bailiff, he may ſay *de ſon tort demeſne, et ſans tiel cauſe*, and ſo puniſh him.

Bruerton

Bruerton *againſt* Rainsford.

CASE 4.

J. S. maketh a leaſe for years, to commence after the death of a tenant for life, or after the end of a leaſe for years in being: a ſtranger after the death of the tenant for life, or the end of the leaſe, enters by tort. It was agreed by the Court, that notwithſtanding the entry, the leſſee may grant over his term: but if he had entered, and been afterwards put out, he cannot grant his term till he re-entereth (*a*).

A leſſee may aſſign his term, if no actual ouſter has taken place. Poſt. 127. 275. 5. Co. 124. 3. Leon. 156. 3. Mod. 198. 2. Barnes, 153.

Ld. Ray. 728. 780. 3. Bac. Abr. 446. 10. Mod. 2. 177. 265. 12. Mod. 113. 125. 5. Burr. 2830. Dougl. 455.

(*a*) By 21. Jac. 1. c. 16. no entry ſhall be made upon any man's lands, unleſs within twenty years after his right ſhall accrue; and by 4. and 5. Ann. c. 16. no entry ſhall be of force to ſatisfy the ſaid ſtatute, or to avoid a fine, unleſs an action be thereupon commenced within one year after, and proſecuted with effect.

Lord Cromwel *againſt* Andrews.

CASE 5.

ATTAINT. It was agreed by the Juſtices, that if there be leſſee for years rendering rent, and for not payment a re-entry, and he payeth the rent before the day to the leſſor, and hath his acquittance, and at the day when the rent is due, the leſſor demands it, and none is there to pay it, the condition is broken; for the payment before the dav is not a payment of the rent, but of a ſum in groſs (*b*).—Secondly, It was ruled, that where a leaſe is made rendering rent at Michaelmas, between the hours of one and five in the afternoon, and a re-entry, &c. the leſſor cometh at the day at two of the clock, and continueth demanding till five, and the rent is not paid, he may re-enter, although he was not at one of the clock, when peradventure the leſſee was there, and tendereth it (*c*).

Rent paid *before* the day, will not ſave the condition of re-entry, if on demand it be not paid *at* the day.

(*b*) Cowp. 245. 10. Co. 127. 4. Bac. Ab. 353. 357. 359.

(*c*) Co. Lit. 202. a. Poſt. 48. 63. 4. Leon. 179. Prec. Ch. 555.

1. P. Wms. 178.

Anonymous.

CASE 6.

NOTE, It was held *per curiam*, that if one lets a houſe rendering rent, and for not payment, &c. it is not ſufficient to demand the rent at the door of the houſe if it be open, but the leſſor muſt enter into the houſe, and there demand it: ſo if a leaſe be made of land, the leſſor muſt enter into the moſt notorious place of the land, and there demand it. *Ex relatione* FOUNTAINE, *incerti temporis*.

Demand of rent muſt be made upon the demiſed premiſes. 49. Aſſ. 5. Dyer, 329. Plowd. 70.

Cro. Jac. 423. Co. Lit. 201. 202.

Higham *againſt* Baker.

CASE 7.

Trinity, 22. Eliz. Roll. 640.

REPLEVIN. The defendant avows for *damage feaſant*. Upon a ſpecial verdict, the caſe was, *Thomas Higham*, the father of the plaintiff, was ſeiſed of a meſſuage called *Maſcals*, to which no land did appertain; and being poſſeſſed of a farm called *Jaques*, to which an hundred acres of land did appertain, purchaſeth the feeſimple of *Jaques*, and let the ſaid farm called *Jaques*, and ſixty acres to it belonging, to *Wakefield*; and occupieth the other forty acres with *Maſcals* by the ſpace of ten years; and by his will deviſeth "all his farm called *Jaques*, and the land to the ſame be-"longing, then in the tenure of *Wakefield*, to his wife for life." And deviſeth further by theſe words, "ITEM, I will that *it*, and "all the reſt of my lands thereunto belonging, whereſoever they

A man deviſes lands to his *wife* and his *youngeſt ſon* by name, for payment of debts, &c. and after the death of his wife the remainder to his youngeſt ſon in fee, the wife ſhall have an eſtate for life by implication.

Higham against Baker.

Cro. Jac. 75. Godb. 26. 3. Leon. 130. 2. Leon. 226. Moor, 123. Vaugh. 263. 1. P. Wms. 40. 473. Prec. Ch. 439. 1. Wood's Con. 170. Cowp. 43. Doug. 417. 759. Post. 300. 474.

"lie, shall remain to my youngest son *Robert*, and to the heirs of "his body, after the death of my wife." And deviseth further, "his farm called *Mascals*, and the lands to the same belonging, to "*Alice* his wife, and the said *Robert*, for payment of his debts, "and performance of his legacies; and that after the death of his "wife, all the said farm called *Mascals*, with the lands to the "same belonging, shall remain to *Robert* in fee." It was averred, that the debts and legacies were paid, and the taking was in the forty acres which were occupied with *Mascals*.—The Justices held clearly, that, by the first part of the will, the wife had nothing in the forty acres; for the devise to her was of "the farm of *Jaques*, and the land "to it belonging, then in the tenure of *Wakefield*;" although he saith afterwards, "that *it*, and the rest of the lands thereunto be-"longing, wheresoever they lie, shall be to *Robert* my son, &c. "after the death of my wife." Admit that the forty acres shall be said to pertain to *Jaques*, yet the wife shall take nothing in them by implication, and *Robert* shall have nothing in them during the life of the wife, but the eldest son shall have them by descent during her life; and what she shall have, was expressly devised to her before, and so shall not have any more by implication.—

Cro Jac. 75. Moor, 7. 124. Ld. Ray. 204. Gilbert on Devises, 78.

Meade said, it was adjudged in *Glover v. Clatches*, upon reason, that where a devise was to one and the heirs males of his body, and if he died without issue of his body, remainder over; if he died without issue male, having issue female, she shall not take by implication.—Anderson, C. J. said, he heard *Sir Anthony Browne* rule this case, That where a man deviseth lands to his wife, and deviseth other lands to a stranger after the death of his wife, she shall not have those lands by implication; for when any thing was given by express words, it shall not be intended that the devisor intended the other land by implication: for it is to be supposed, if he had so intended, he would have given it before expressly; and the forty acres cannot pass by the first part of the will to *Robert*, for the forty acres were severed from *Jaques*, and conjoined and occupied with *Mascals*. At this day nothing was spoken to the second part of the will, for the serjeants only recited the first part; but at another day the record was read before them, and all the matter then appeared as it is at first recited. All the Justices held, that it appeareth by the latter part of the will, that the testator did never intend to pass those forty acres as parcel of *Jaques*, but he reputed them as parcel of *Mascals*. Anderson, C. J. said, that land shall pass as pertaining to a house which hath been occupied with it by the space of ten or twelve years, for by that time it has gained the name of parcel or belonging, and shall pass with the house by that name in a will or lease, &c. And here by this second part of the will, the wife and *Robert* have a joint estate till all the debts and legacies are paid; which being averred to be paid, that estate doth cease, as it was lately adjudged in the queen's bench: and when it is limited over, that *Robert* shall have it after the death of the wife, the wife shall have the entire estate for her life; and after her decease, *Robert* shall have it in fee.—Afterwards judgment was commanded to be entered for *Baker*, the avowant, (who had married the wife) to have return; for the feme by the second limitation had the entire estate; and in the forty acres the taking was supposed.

Cro. Car. 308. Post. 704. 2. Term Rep. 498. 502.

Ashborough's

Aſhborough's Caſe. Case 8.

FENNER ſaid, it was adjudged in that caſe, 10. *Eliz.* that if the ſheriff aſſign dower by writ to him directed, and doth not return the writ, yet ſhe is lawfully ſeiſed in dower; but it is otherwiſe in a partition by writ, for there a ſecond judgment ought to be given. Dower is well aſſigned tho' the ſheriff does not return the writ.

PERIAM ſaid, it was adjudged in *Clipton's caſe*, after he came to the bench, that if the ſheriff take one by *capias ad ſatisfaciendum* in debt, if he after permitteth him to go at large, and returneth not the writ, debt lieth upon this eſcape againſt him; for there is a record of which the party ſhall take advantage, though the writ be not returned. Moor, 209. 4. Co. 67. a.

Anonymous. Case 9.

FRANCIS GAWDY moved this caſe. A fine was levied with a *render*; the *render* was with warranty; and the officers of the fine refuſed to take it by reaſon of the warranty annexed, which had not been known before time. But all the Juſtices conceived it was good; for although it was not uſual that he which *renders* ſhould warrant the land, becauſe he taketh no benefit, yet if he will warrant it, it is not to be doubted, but it is good enough: and the officers were commanded to receive the fine. In levying a fine the perſon who *renders* may make the *warranty*. Poſt. 690.

Thomas Foſter and others *againſt* Spooner and Aford. Case 10.

WASTE. The place WHERE, was *Wallingford Park*. *Spooner*, one of the defendants, made default at the grand diſtreſs, and thereupon againſt him the inqueſt was awarded to enquire of the waſte and damages. *Aford* pleads, he had nothing in the trees in which the waſte was ſuppoſed, and upon this they were at iſſue. Upon evidence the caſe appeared to be, that *Shelly*, being leſſee for years of the park, grants all his intereſt and title in the ſaid leaſe to *Aford*, ſaving and excepting all the wood and underwood growing upon the land; and if upon this matter *Shelly* ſhall be ſaid to be leſſee of the wood, againſt whom the action of waſte ſhall be brought, or *Aford*, was the queſtion. The ſerjeants of the plaintiffs part ſaid, notwithſtanding this exception, it is a good grant of *Shelly* to *Aford* of the wood, for he that made the exception had no intereſt in the trees, being only leſſee for years, and ſo the exception void; and in this action the land is to be recovered as well as damages; and if *Aford* be not the leſſee, the plaintiffs cannot know againſt whom to bring the action, for *Shelly* hath only the trees and not the land, and ſo no action againſt him.—ANDERSON, C. J. and MEADE held, that the action ſhall be brought againſt *Shelly*, for the trees paſſed not to *Aford*; for the intereſt in them that *Shelly* had he hath reſerved, ſo as he ſhall have all the profit of them, as if hernes, &c. breed in them, &c. ANDERSON ſaid, as to what was ſaid, that *Shelly* had no property in the trees by the common law, the leſſee had intereſt in the trees, and the ſtatute does not take it away, but prohibits him that he ſhall do no waſte, and makes him puniſhable for it: and as to the objection, that they can recover no land, If a leſſor reſerve the wood upon the demiſed premiſes, he may juſtify an entry to cut it down and carry it away. But *quære* if a leſſee can make ſuch a reſervation to an undertenant? 2. Inſt. 302. 1. Leon. 49. 11. Co. 48. b. 1. Saund. 322. 1. Term R. 56. Co. 11. 48. b.

FOSTER *againſt* AFORD, &c.

and ſo no action waſte lieth; if a man lets the trees of his park, waſte lieth againſt the leſſee for cutting of them; and if an action of waſte doth not lie, yet he may have an action upon his caſe; and to this opinion WYNDHAM ſeemed to agree. PERIAM held ſtrongly the contrary, that the exception was void by a leſſee for years, for he hath no intereſt in the trees, and neither at common law or ſince the ſtatute, is the property of trees in the leſſee; and although before the ſtatute there was no law to puniſh him, yet that doth not prove he might lawfully cut them: and at this day, if the leſſor cuts down the trees and takes them away, the leſſee ſhall not recover according to the value of the trees, but for the entry, &c. which caſe MEADE agreed; and becauſe the Court was divided, they commanded the jury to find the ſpecial matter, and to leave it to the diſcretion of the Court. In this caſe it was affirmed by them all, that if a man maketh a leaſe, reſerving the wood, &c. he may juſtify the entry to cut them and carry them away.—And it was held by all the prothonotaries in this caſe, that if the defendant in a writ of waſte loſeth by default at the grand diſtreſs, enquiry ſhall be made of the waſte, and to what damages; but if he loſes by confeſſion or *nient dedire*, or by pleading *non ſum informatus*, &c. the waſte ſhall not be enquired, but only the damages: and ſo it was done in this caſe; for as to *Spooner*, they were commanded to enquire of the waſte and damages; and as to *Aford*, of the damages only. NOTA, 5. *Co.* 12. cited it to be adjudged, that the exception was void, and that waſte lay againſt the aſſignee. *Vide Coke's Entries*, 695. the whole record of the caſe, but no judgment.

11. Co. 52. a.

On default in a writ of waſte, the ſheriff ſhall enquire of the *waſte and damages*; but on judgment after appearance, of the damages only.

Poſt. 263. 290. Cro. Jac. 296. F N. B. 55. Poph. 24. 3. Black. Com. 228.

CASE II.

Higgins *againſt* Grant.

The grant of a manor will not paſs an advowſon appendant without ſaying *cum pertinentiis*. Poſt. 340. Co. Lit. 77. a. 307. a. Plowd. 252. 1. Saund. 323. Dyer, 366. 10. Co. 64. 12. Co. 5.

EJECTIONE FIRMÆ. Upon evidence to the jury the juſtices ſaid, if one doth demiſe a manor to which an advowſon is appendent, and ſaith not *cum pertinentiis*, the advowſon doth not paſs.

A leaſe by a parſon made before 13. Eliz. c. 10. held good, tho' not confirmed till after. Co. Lit. 44. 5. Co. 15. 3. Co. 65. Cro. Car. 38. Cro. Jac. 53. 3. Ba. Ab. 375 389. 393.

IN this caſe the plaintiff claimed under a leaſe made by *R. Stake*, parſon of *Shenly*, 11. *Eliz.* and that *Mi. Poultney* being patron in reverſion in fee, confirmed the leaſe; and after the 13 *Eliz.* c. 10. *viz.* in 14. *Eliz.* the ordinary confirmed it; and 23. *Eliz.* he who had the patronage in right of his wife, together with his wife, confirmed the leaſe; and all theſe confirmations were ſhewn; and it was averred, that the patroneſs for life was living.—THE JUSTICES held, that the confirmation by the ordinary and patrons were good; for the ſtatute doth ſpeak of alienations, &c. by incumbents to be void after the ſtatute, but doth not make void confirmations made of a leaſe before the ſtatute.

Pleading in ejectment on a church leaſe.

Poſt. 154. Dougl. 573.

THE plaintiff did declare of a leaſe by the parſon, but doth not aver his life, and by his death the leaſe is void, and no acceptance can make it good; and the plaintiff pleaded a confirmation by the patron for life, and ſheweth not how the patron came to this particular eſtate.—THE JUSTICES held, that he needed not ſhew what eſtate the patron had, but when he did ſhew he hath but an eſtate for life, he ought to ſhew how he came to it.

Harris and Haies *against* Nichols.

Case 12.

QUARE IMPEDIT. It was held by MEAD, WYNDHAM, and PERIAM, *Justices*, that if two co-parceners be of an advowson, and they severally grant their parts to two several men, the advantage that was between the parceners doth hold place between the grantees, as the first presentment shall go to the grantee of the eldest, and so of the others; and an usurpation of one shall not put the others out of possession. 22. *Edw.* 4. But they said, peradventure it shall be otherwise, if they were mere tenants in common, and did not derive their estates from co-parceners; and yet the book in 22. *Edw.* 3. *pl.* 9. that between strangers in blood, or where two make composition to present by turn, if one usurp upon the turn of the other, this shall not put him out of possession.—ANDERSON, C. J. doubted, but he agreed that tenant by the courtesy shall have the same advantage that his wife should have had.

If co-parceners assign their parts of an advowson severally, the grantees shall present *by turns*. Co. Lit. 186. b. 3. Co. 22. b. 2. Inst. 365. 2. Roll. Ab. 346. Keilway, 49. See Hargrave's note [2], Co. Lit. 166. b; the 7. Ann. c. 18. and 8. and. 9. Will. and Mar. c. 31.

It was held by MEADE and WYNDHAM, *Justices*, that if a man hath a manor which doth extend into two towns, and he grants the demesnes and services in one town, the grantee hath a manor in that town, and he may keep court, and so hath the grantor a manor in the other town, and may keep court there. Owen, 138.

A manor may be divided by grant of parcel. Post. 39. 2. Roll. Ab. 122. 1. Bulst. 54.

Anonymous.

Case 13.

ACCOMPT. The defendant was adjudged to accompt, and a *capias ad computandum* issued against him to accompt, before auditors at a certain day, at which day he appeared and entered into accompt; and the auditors assigned them to appear before them at another day certain, at which day the plaintiff did not proceed. FENNER moved what shall be done in this case, if he shall be nonsuited, or barred of accompt, or if the action be discontinued. —The Court demanded of the prothonotaries, who said, there can be no nonsuit, because it is after judgment, but that a discontinuance shall be entered, and the defendant and his sureties put without day; and if the plaintiff will after proceed upon this accompt, he shall have a *scire facias* upon this record *ad computandum*: and so the Justices did award in this case.

Default before auditors is a *discontinuance*, for there can be no *nonsuit* after judgment; but the cause may be revived by *scire facias*. Co. Lit. 139. b. 11. Co. 38. a. Andrews, 29.

Lutwich *against* Hussey.

Case 14.

ASSUMPSIT. The plaintiff declared, that whereas the defendant was indebted to the plaintiff, and the father of the defendant being also indebted to the plaintiff in another sum, he did assume, that if the plaintiff *paululum cessaret* to demand the debt which he did owe to him, that he would pay both the debts; and shewed that upon this promise he did forbear the demand of his money for half-a-year, and for not payment of the debt of the father the action was brought, and it was upon the issue found for the plaintiff. And it was alledged in arrest of judgment, that there was no consideration of the promise, for it is not said for how

Forbearance for *a short time*, is not a good consideration. Post. 455. 665. 750. 1. Roll. Abr. 23. 27. Cro. Jac. 250. Cro. Car. 41. 1. Leon. 61. 1. Sid. 451 Cowp. 129.

Lutwich *against* Hussey.

how long he ſhould forbear; for if he did forbear for a quarter of an hour or leſs, he hath performed the word, *quod paullulum ceſſaret*; and although the plaintiff doth alledge he did forbear for half-a-year, this will not help the caſe. And of that opinion were the Juſtices; and commanded, if no other matter be ſhewn before the end of the term, *quòd nihil capiat per breve.*

Case 15.

Pollard *againſt* Scholy.

A bona fide contract ſhall not be avoided by a ſubſequent agreement to take more fee for forbearance than legal intereſt.

Moor, 398. Cro. Jac. 508. 1. Saund. 294. 1. Mod. 29. 2. Mod. 307. 5. Bac. Ab. 408. Ray. 197. 1. Vent. 38. Cowp. 112. 1. Hawk. 528. Dougl. 235.

DEBT. The caſe was, *Pollard* ſold to the defendant two oxen, 22d June, 22. *Eliz.* for ſix pounds ſix ſhillings and eight pence, to be paid at All Saints next; and at the ſame day *Scholy* required of him a longer day for payment, &c. and *Pollard* gave him till the firſt day of May next, paying to him for the forbearance of his money three quarters of wheat, which was above the value of ten pounds *per annum* for an hundred pounds, according to the 13. *Eliz.* c. 8. ſ. 5. (*a*): and the defendant in debt for the ſix pounds ſix ſhillings and eight pence doth plead this, and would avoid the contract.—The opinion of the Juſtices was, that the ſtatute doth not make the contract void, which was duly made, but doth only avoid all contracts for uſury; and this laſt contract is void, being againſt the ſtatute; but the firſt was good, being made *bonâ fide.*—Nota, *Hill. Term*, 20. *Eliz. B. R.* in an information by *Mallory v. Bird.* If one contracts to have twenty pounds for the loan of an hundred pounds, if he taketh nothing of the twenty pounds, he is not puniſhable by the ſtatute; but if he taketh any thing, if but one ſhilling, this is an affirmance of the contract, and he ſhall render for the whole contract.

(*a*) See 12. Ann. ſt. 2. c. 16.

Case 16.

Beauchamp *againſt* Dale.

If a diſſeiſor *leaſes* to a diſſeiſee *for life*, the diſſeiſee ſhall be in by remitter.

Co. Lit. 363. b. 5. C. Dig. 419.

QUO MINUS. It was adjudged, after argument and deliberation, that where a diſſeiſor letteth the land to the diſſeiſee for life by indenture, that this is a remitter to him, for by this he confeſſeth the deed; but by his entry to take livery, the law hath its operation, and doth remit him againſt his own acceptance; (*ex relatione* Johannis Heale, *who argued this caſe*;) and it was adjudged upon conference between the Barons and all the Juſtices.

Trinity

Trinity Term,

25. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Thomas Meade, *Eſq.* } *Juſtices.*
Hugh Wyndham, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Webb *againſt* Neſt.

CASE 1.

Hillary Term, 24. Eliz. Roll 410.

Tenant in fee ſimple, expectant upon an eſtate for life, bargains and ſells to *A.* who is made tenant to the *præcipe*, and he vouches the tenant in fee. This recovery (to the uſe of the *reverſioner* for life, remainder in tail) is good againſt *him* by eſtoppel.

THE caſe was, *Hugh Bury*, ſeiſed of divers manors in the county of *Devon*, by his deed indented and enrolled between him of the one part, *Robert Kemp* and *Nicholas Adams* of the other part, in conſideration of twenty pounds paid by the ſaid *Robert* and *Nicholas*, bargained and ſold the ſaid manors to the ſaid *Robert* and his heirs, to the intent that the ſaid *Robert* ſhould ſuffer the ſaid *Nicholas* and *H. Gifford* to recover the ſaid manors againſt him, which ſhould be to the uſe of the ſaid *Hugh Bury* for life, remainder to his ſon in tail, with divers remainders over; which recovery was accordingly ſuffered, *Haward* and *Brook* being then tenants of the freehold of the ſaid manors, the reverſion to him againſt whom the recovery was; afterwards *Haward* and *Brook* die, *Hugh Bury* enters, and let to the plaintiff, &c.

Two points were moved. *Firſt*, If the uſes expreſſed in the indenture of bargain and ſale were good? *Secondly*, If the recovery ſuffered againſt him in the reverſion where the freehold was in a ſtranger, ſhall bind the reverſioner and his heirs?

Godb. 141. 4. Leon. 238. 1. Wood's Con. 604. Pigot on Recov. 33. 200. Cowp. 704. 2. Term Rep. 171. Poſt. 670. c. Co. 36. b.

The COURT held clearly as to the firſt point, that the limitation to the uſes, as this caſe is, was good. *Secondly*, That the recovery is good againſt him in the reverſion and his heirs: and they commanded judgment to be entered accordingly (*a*).

(*a*) See 14. Geo. 2. c. 20.

Anonymous.

CASE 2.

A releaſe by a copyholder to the lord's grantee of the freehold is an extinguiſhment of the copy.

THE caſe was, The lord granted the freehold of a copyhold to a ſtranger; the copyholder being in poſſeſſion releaſeth to the grantee all his right in the land; the queſtion was, If this doth extinguiſh the copyhold?

ANDERSON, C. J. held it did not, and ſaid, it was adjudged that if tenant for life releaſeth to him in the reverſion, this is void; for it cannot inure as a releaſe, for he is in poſſeſſion; nor can it inure

Ante 7. Hutt. 81. Jones 41.

ANONYMOUS. as a surrender, for want of fit words; so of lessee for years, *Dyer*, 251. and it is so in this case.

1. Hob. 808. 1. Leon. 102. Cro. Jac. 169. 1. Lev. 145. 1. Bac Ab. 481. 2. Bac. Ab 451. Gilb. Ten. 301.

But SNAGG, *serjeant*, said, he knew it to be ruled in a case of great importance, that notwithstanding the words will not amount to a surrender, yet the consent and agreement of the lessee, which is proved by the deed, will amount to a surrender.

CASE 3.

Anonymous.

Bail are discharged by the surrender of the principal; but the plaintiff may either have a *ca. sa.* or a *fi. fa.*

A MAN condemned in debt renders himself to the court, and praveth his sureties may be discharged. The plaintiff was demanded, for the Court said he may elect either his body, or to take his goods in execution; but by this offer the sureties were discharged (*a*).

1. Cromp p. 70. 4. Burr. 339. 409. Comb 263. 2. Term Rep. 757.

(*a*) Bail are discharged if the defendant becomes a *peer* pending the action. Dougl. 45.

CASE 4.

Sir John Souch's Case.

Re entry for non-payment of rent to a suspected stranger, without written authority, good.

HE made a lease for years, rendering rent, and a re-entry for non payment, and at the day a stranger came to demand the rent. The lessee demanded of him what authority he had of the lessor to demand it; and because he was a cozening fellow, and one that was notoriously infamous, and would not shew any authority, the lessee would not pay the rent; and thereupon the lessor entered: and his entry adjudged lawful, for a command to receive rent may be *per parols*.

Post. 813. Moor, 141. 5. Co. 76. Hob. 154. Dyer, 222. Cro. Jac. 178. Owen, 28. Dougl. 483.

CASE 5.

Anonymous,

A man may avow for rent on a lease to a *que estate*, without shewing all the mean assignments.

AUDITA QUERELA. The question was, if the conusor shall be compelled to make mention of all the mean assignments of the conusee, &c. And the Court doubted.

ANDERSON, C. J. said, that in the time of *Lord Dyer* the case was, that lessee for years assigned over his term, and there were divers mean assignments. In debt for the rent he ought to make mention of all the mean assignments; and because the plaintiff could not do it, he was compelled to distrain and avow for the rent, for he cannot say he let the land to one whose estate the defendant hath: so it is in waste.

Co. Lit. 121. a. 303. 1. Sid. 297. 1. Saund. 112. Cro. Car. 100. 2. Salk. 562. Dougl. 667. 3. Term Rep. 147.

CASE 6.

More's Case.

Judgment given in *debt* on a determinate contract, although the plaintiff declared for more than he proved.

DEBT. The plaintiff declared, that the defendant had *bargained* with him to give him for the pasturing of every horse by the night two-pence, and of every ox one penny half-penny, and sheweth that he had pastured seventy horses and three hundred oxen; *et ideo actio accrevit* to demand, &c. And he demanded more than upon his own shewing it appeared he should have, for the number of

the

the horſes and oxen did not amount to the ſum of which he had counted. This was alledged in arreſt of judgment, after verdict found for the plaintiff; and, notwithſtanding, judgment was given for the plaintiff. Morr's Case. Poſt. 80. 292. Sed vide contra Moor, 298.

But FENNER ſaid, that in *Anſlow's Caſe*, who brought a writ of annuity, and demanded twenty nobles; and it appeared by his own ſhewing, that he was to have but nineteen nobles.—The writ was abated by award of the Court. Yelv. 5. Latch. 175. 5. Mod. 214. Cro. Jac. 128. 247. 449. 560.

3. Black. Com. 154. Cowp. 766. Dougl. 377. 1. Term Rep. 447. 2. Term Rep. 29.

Audley *againſt* Suttrel.

Case 7.

EJECTIONE FIRMÆ. The defendant challenged the array, becauſe the ſheriff was couſin to the plaintiff, which was confeſſed; but it was ſaid, that the ſheriff is as near of kin to the defendant: and upon this it was demurred, and by advice the array was quaſhed. An array quaſhed for affinity. Co. Lit. 156. a. Poſt. 663.

Anonymous.

Case 8.

DEBT againſt an executor, who pleaded he had *riens in ſes maines*, but certain goods, diſtrained and impounded: it was adjudged to be no aſſets to charge him. Goods impounded are not aſſets.

Co. Lit. 47. 2. Bac. Abr. 427. 1. Wood Con. 139.

Hilary Term,

26. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Thomas Meade, *Eſq.* } *Juſtices.*
Hugh Wyndham, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Chamberlaine's Caſe.

Repleader awarded.

Dougl. 396. 747.

AVOWRY for rent, and made title to it, as couſin and heir to *Robert Chamberlaine*, that is to ſay, ſon of *Anne*, daughter of *Robert*, and for rent arrear for ſixteen years after the death of *Anne* he avowed: and becauſe he made title to it immediately as heir of *Robert*, and after avoweth for rent after the death of *Anne*, which cannot be, for it ſhall be intended that ſhe died in the life of *Robert*, and iſſue being joined upon another matter, they were awarded to RE-PLEAD.

CASE 2.

Wharton *againſt* Morley.

Grant to the King good without being inrolled.

Dougl. 56.

COKE ſhewed to me a report, which he ſaid he had from *Edmund Plowden*, of a judgment in the exchequer, 7. *Eliz.* between the ſaid parties, that whereas a prebend did give and grant his land to king *Edward* the ſixth, and this deed was not enrolled, yet the grant was good, and veſted the land in the king, by the *proviſo* in the end of 1. *Edw.* 6. c. 14. ſ. 42.; for although it was not good at common law, yet the ſtatute doth make it good, or elſe the ſtatute were in vain.

CASE 3.

Stockbridge's Caſe.

If a copyhold eſtate be converted into a freehold, it is within the protection of 11 Hen. 7. c. 20. Ante, 2. Poſt. 510. 544 Gilb. Ten. 181 303. Hob. 176.

THE caſe was, *Baron* and *feme* copyholders, to them and their heirs. The *baron*, in conſideration of money paid by him to the lord, obtaineth an eſtate of the freehold to him and his wife, and to the heirs of their bodies. The *baron* dieth, having iſſue. The *feme* enters, and ſuffers a common recovery, and his heir enters by the ſtatute of 11. *Hen.* 7. c. 20. (*a*): and agreed the entry was lawful; for the copyhold, by the acceptance of the new eſtate, was extinguiſhed.

2. Sid. 41. 73. 4. Mod. 45. 2. Bac. Abr. 93. in notis. 1. Salk. 185.

(*a*) Confirmed by 32. Hen. 8. c. 34.

Eaſter

Eaſter Term,

26. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Thomas Meade, *Eſq.* } *Juſtices.*
Hugh Wyndham, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Gibbon *againſt* Cordell.

CASE 1.

EJECTIONE FIRMÆ. The caſe, upon ſpecial verdict, was, *Heydon* was ſeiſed of the houſe and land in queſtion, and came to *Cordell* to borrow 20l. of him, and for aſſurance of the money, offered him the houſe and land in queſtion; and thereupon they agreed, and went to the houſe, and *Heydon* called the tenants of the houſe, who were tenants at will, and ſaid, "Sirs, I have ſold my houſe and land to *Cordell* for twenty pound, "if I pay him not the money at ſuch a day; and if I pay him the "money, I ſhall have the land; and if I pay it not, then I clearly "bargain and ſell them to him;" and puts *Cordell* into the houſe, and locks the doors, and delivereth him the keys, and ſaid to the tenants, "*Take him for your maſter.*" It was argued by GODFREY and SNAGG, and afterward adjudged it was a good livery, and an eſtate for life, at the leaſt, paſſed: but if a fee paſſed, it was not queſtioned, becauſe *Cordell* was alive.

How a livery in deed of land may be made. 1. Leon. 18. Moor, 144. 286. Co. Litt. 486. 1. Wood's Con. 516. 2. Term Rep. 739.

Dowſe's Caſe.

CASE 2.

A LEASE was made to *A. B.* and *C.* for their lives, *habendum* to *A.* for life, the remainder to *B.* for life, the remainder to *C.* for life. It was adjudged a good limitation, and they ſhall take according to the *habendum*; for in the *premiſes* a joint-eſtate is given only by implication, which is controlled by the expreſs limitation in the *habendum*.

The *premiſes* of a leaſe controuled by the *habendum*. Co. Lit. 183. b. Poſt. 89.

Fiſher *againſt* Banks.

CASE 3.

AUDITA QUERELA, for that the plaintiff was in execution in debt upon an obligation, and alledgeth it was made for uſury-money, contrary to 13. *Eliz.* c. 8. And becauſe it did appear to the Court, that he was condemned upon a *nihil dicit* after he had made an attorney and appeared; ſo that he might have pleaded this plea in avoidance of the obligation, and then did not plead it. The *audita querela* was diſallowed by the whole Court; for an *audita querela* doth not lie after judgment, upon a thing he might have pleaded before; but when he is condemned by default, and

An *audita querela* will not lie for what might have been pleaded before. Ante, 4. 2. Roll. Abr. 306. 1 Sid. 55. Salk. 93. Carth. 278. 2. Lut. 1143. 1174. Cowp. 728.

FISHER *againſt* BANKS.

and had no day in court to plead it, there it lieth: And they ſaid, upon this reaſon they had over-ruled a like caſe this term.

CASE 4.

Sir William More's Caſe.

An *adminiſtrator* is in law an *aſſignee*. Poſt. 657. Co. Lit. 210. a. 1. Wood's Conſ. 280. Dougl. 184.

A LEASE is made for years upon condition that the leſſee, his executors, or *aſſigns*, ſhall not alien without aſſent of the leſſor. The leſſee dieth *inteſtate*, and the ordinary grants adminiſtration to *J. S.* who aſſigneth without licence. It was adjudged, that the condition was broken, for he is an *aſſignee* in law.

CASE 5.

Lee *againſt* Vincent.

Eaſter Term, 26. Eliz. Roll 371.

If a deviſe be that the teſtator's *ſons in law* ſhall ſell the land, and one of them dies before the teſtator, a ſale by the two ſurvivors is good. Poſt. 80. 525. 856. S. C. Dyer, 176. 219. Co. Lit. 113. a. 2. Leon. 285 3. Leon. 106. 1. And. 145. 1. Roll. Ab. 328. Moor, 147. Cro. Car. 382. Po. on Dev. 297.

THE caſe was, *John Lee* deviſed his land to *William* his ſon in tail, and if he depart without iſſue, that his ſons in law ſhall ſell it (having then five ſons in law) and dieth; and after one of his ſons in law dieth, then *William* dieth, having iſſue a daughter, and afterward the daughter dieth without iſſue, the four ſons in law that ſurvive ſell it. The queſtion was, If this ſale were good? —GEORGE WYAT argued for the plaintiff, and GODFREY for the defendant. The points were two. *Firſt*, For that the ſon died, having iſſue, although the iſſue died without iſſue, if the ſale be good. *Secondly*, One of the ſons in law was dead, and being an authority, it cannot ſurvive. But it was adjudged a good ſale, becauſe he named them not by their proper names. GODFREY ſaid, it was adjudged, 4. *Eliz.* where one deviſed his land to his wife for life, the remainder to his ſon in tail, and if his ſon dieth without iſſue, that his executors ſhall ſell the land by the advice of *A.* and *B.* and *A.* dieth in the life of the ſon, the ſale after the death of *A.* is not good; but if *A.* had aſſented in his life-time, it had been good.

CASE 6.

Roe *againſt* Hartly.

Writ of error does not lie in C. B. upon judgments in inferior courts. 1 Roll. Ab. 745.

IT was held by all the Juſtices, that a writ of error doth not lie in the common pleas, upon an erroneous judgment given in any inferior court of record. And this was, as they ſaid, upon great advice. *F. N. B. Cont.* 20. *D. v.* 8. *Eliz. Dyer*, 250. Moor, 78. 1. Leon. 55. 3. Leon. 159. Dyer, 250. And. 12. Cart. 222.

CASE 7.

Griffith *againſt* Moriſon.

Words actionable. Poſt. 31.

ACTION for theſe words, "*Where is that bankrupt knave? where* "*is that pillory knave?*" (*innuendo* the plaintiff) and averred he was a merchant; and the words were adjudged actionable.

CASE

Mayor and Burgeſſes of Windſor's Caſe.

A ſheriff cannot be ſued for the eſcape of a priſoner who was never in his cuſtody. Poſt. 158 743. Dalt. Sher. 560.

A CAPIAS AD SATISFACIENDUM was awarded to the ſheriff of *Berks* to arreſt *J. S.* who was then in cuſtody of the *Mayor* and *Burgeſſes* of *Windſor*, and thereupon the ſheriff awarded a warrant to the *Mayor*, &c. to take him, and afterward they let him eſcape; and it was held clearly, that debt upon the eſcape lieth againſt them, and not againſt the ſheriff. So it is of a bailiff of a franchiſe. Cowp. 63. 2. Term Rep. 5. 126.

Eſton

Eston *against* Wood.

CASE 9.

THE case was, The defendant covenanted by indenture with the plaintiff, that whereas he intended to marry *Elizabeth Smalwell*, a widow, that he would pay all the legacies which she by her last will in writing, bearing date 1st *May*, 20th *Elizabeth*, did give and bequeath, and was bound by obligation to perform the covenants in the indenture. In debt upon the obligation, the defendant pleaded, that after the making of the will and the obligation, he intermarried with the said *Elizabeth Smalwell*, which marriage continued till her death, so the will and devise of *Elizabeth* was void; and demanded judgment, &c. And it was adjudged, that the plaintiff shall recover; for notwithstanding it was not a will to all intents and purposes, yet the indenture referreth to that which did bear the name of a will; and although it was not a will in deed, it is not material.

If a man *assents* that his wife shall make a *will*, her execution of this power will be good as an *appointment*, tho' bad as a *will*. Gilb. Dev. 12. Cro. Car. 219. 376. 597. Salk. 313. 1. Mod. 211. 2. Mod. 172. Prec. Ch. 84. 1. Mod. 211. 1. Burr. 431. Wms. 82. 144. Ld. Ray. 515.

11. Mod. 221 1. Vern. 244. 408. 2. Vern. 329. Prec. Ch. 44. 84. 255. 2. Peer 1243. 316. 341. 364. 496. 1. Peer Wms. 126. 2. Stra. 891. 1111. Eq. Cas. Ab. 66. 171. Dougl. 708. Cowp. 260. 2. Term Rep. 685. 2. Brown C. C. 377. 313.

The Bishop of Hereford's Case.

CASE 10.

QUARE IMPEDIT. The case was, The patron presented *J. S.* to the bishop, who gave notice to the patron that the clerk was insufficient; and thereupon the patron presented another clerk, and the bishop admits the first that was presented by the patron, and within the six months. The COURT held clearly, that the bishop was a disturber; for he having once refused him for insufficiency, cannot afterwards accept him.

A clerk refused for insufficiency cannot be afterward promoted to the same living.

Tanfield *against* Finch.

CASE 11.

INFORMATION upon the 13. *Eliz.* c. 8. s. 5. (*a*), for usury. It was held by all the Justices, upon evidence to the jury, *Finch* gave to *Tanfield* 566l. for an annuity of 120l. during twenty-three years. This is clearly no usury when there was no communication before between them, to have any consideration for the loan of the 566l. for this annuity was purchased *bonâ fide* without any corrupt intent or bargain: and if it had been 40l. *per annum* for forty years, for 100l. it had been no usury, no more than if one for 100l. purchase lands worth 40l. *per annum*.

Another matter was in this case: That after the grant of the said annuity of 120l. for twenty-three years for the said 566l. in hand paid, *Tanfield*, for the assurance of the said annuity, infeoffed *Finch* of land worth 100l. *per annum* to the use of *Tanfield* and his heirs, upon condition, that if the money were not paid, it should be to the use of *Finch* in fee. And all the Justices held it was no usury; for the mortgage was only for the assurance of the annuity.

NOTA, In *Doctor Goad's case*, *Trin.* 19. *Eliz.* in the exchequer in an information for usury, POPHAM and PLOWDEN held, That if a man giveth 100l. for an annuity of 20l. *per annum*, this is not usury, for he shall never have his stock of 100l. again. But BELL, *Chief*

It is not usury to purchase *bona fide* an annuity under its just value, although the payment is secured by mortgage. *Seems* if the bargain was colourable, and to elude the statute.

(*a*) See 12. Ann. st. 2. c. 16. 5. Co. 69. b. 2. Lev. 8. 3. Wilf. 393. 2. Bl. Rep. 861. Cowp. 112. 770. Cowp. 793.

TANFIELD *againſt* FINCH.

Chief Baron, held clearly, if two men ſpeak together, and one of them deſireth the other to lend him 100l. and for the loan of it he will give him above 10l. *per annum* (*a*); and for an evaſion out of the ſtatute, they invent this practice, that he ſhall grant to the other 30l. *per annum*, out of his land for ten years; or he ſhall make a leaſe for one hundred years to him, and the leſſee ſhall regrant it to him, upon condition he ſhall pay 30l. yearly, and every year during the ten years: in this caſe, the firſt contract being corrupt in fraud of the ſtatute, this is uſury, although he never hath his 100l. again. But if *bonâ fide* one buyeth an annuity of 40l. for ten years for 100l. this is no uſury, if the firſt communication was not corrupt. *Ex relatione* EDWARD. COKE.

(*a*) See 12. Ann. ſt. 2. c. 16.

CASE 12.

Thomas Mantell *againſt* Matthew Mantell.

In the Exchequer Chamber.

Forfeiture for high treaſon.

THE caſe was long debated in the common bench, and afterwards brought into the exchequer chamber by Engliſh bill. *Oliver Wood* being *ceſtuy que uſe* in fee of the manors of *Milton* and *Collingtree*, in the county of *Northampton*, 13. *Hen.* 8. by his laſt will deviſed, that his feoffees after his death ſhould ſtand ſeiſed of the manors to the uſe of Sir *Walter Mantell* and *Margaret* his wife, the daughter and heir apparent of the ſaid *Oliver*, for term of their lives; and after their deceaſe, to the uſe of *John Mantell*, their ſon, and of the heirs of his body; and for want of ſuch iſſue, to the uſe of the heirs-males of the body of the ſaid Sir *Walter* and *Margaret*, which they ſhall afterwards lawfully have, with divers remainders over. *Oliver* dieth 13. *Hen.* 8. and afterwards Sir *Walter* and *Margaret* have iſſue *Walter* and *Thomas*. Sir *Walter* dieth 21. *Hen.* 8. Afterward *John Mantell* dieth without iſſue, *Margaret* his mother living; and afterward the ſaid *Walter*, the ſecond ſon of Sir *Walter* and *Margaret* (having iſſue the defendant *Matthew*) was attainted of high treaſon, and executed 1. *Mariæ*. The 9. *Eliz.* Dame *Margaret Mantell* dieth, having no other iſſue; and the plaintiff ſuppoſing the land was forfeited by the attainder of *Walter* the ſon, obtaineth a grant of the ſame from the queen by her letters patents, and ſued the ſaid *Matthew* for entering and claiming the manors as to him deſcended, as couſin and heir of the ſaid Sir *Walter* and *Margaret*, that is to ſay, ſon of the ſaid *Walter*, ſon of the ſaid Sir *Walter* and *Margaret*. And upon the whole matter diſcloſed, it was, 27th *May*, in the ſaid term, decreed by the Lord Treaſurer and all the Barons, that the title of the ſaid *Matthew* was good, and the land was not forfeited by the attainder of *Walter*, he being executed in the life of *Margaret*, who only, as long as ſhe lived, was tenant in tail; and this land did deſcend to *Matthew*, as couſin and heir of the body of *Margaret*, &c. *Vide* 3. *Co.* 10. *the Lord Lumley's caſe*.

Co. Lit. 332. a.

Trinity

Trinity Term,

26. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clinch, *Eſq.* } *Juſtices.*

Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Rice Clampe *againſt* Edmund Clampe.

CASE 1.

REPLEVIN. The defendant avowed for damage-feaſant in the land, which is parcel of the manor of *C.*; and that this land was copyhold, parcel of the ſaid manor, and of the nature of borough Engliſh, and demiſed to *John Boreman* and *Margaret* his wife, and their heirs, by copy of court rolls by the name of a *meſe*, containing twelve acres of land; and that *John Boreman* died, and *Margaret* him ſurvived, and took to huſband *John Clampe*, and had iſſue, the plaintiff, their eldeſt ſon, and the avowant, their youngeſt ſon; and afterward *Margaret* died ſeiſed, and the land deſcended to the avowant, as youngeſt ſon and heir, by the cuſtom, *&c.* who entered and took the cattle damage-feaſant. The plaintiff, by replication, confeſſes the grant to *John Boreman* and *Margaret*, and that *John Boreman* died, and *Margaret* ſurvived, *&c.* and took to huſband the ſaid *John Clampe*, and had iſſue the plaintiff and defendant; but ſaid, that the ſaid *John Clampe* and *Margaret* ſurrendered the ſaid land *per nomen* of the reverſion, after the death of the ſaid *John Clampe* and *Margaret*, to the uſe of the plaintiff and his heirs, who was admitted accordingly; and afterwards the ſaid *Margaret* died, and *John Clampe* did ſurvive; and afterwards the ſaid *John Clampe* died, the plaintiff entered ABSQUE HOC; that the ſaid land did deſcend to the defendant, as *puiſne* ſon, *&c.* And upon this replication, it was demurred in law.—COKE, for the avowant, prayed judgment. *Firſt*, For the matter in law, the plaintiff's plea is not ſufficient; for he pleaded a ſurrender of the land by the name of a reverſion, after the death of the *baron* and *feme*; and by that pretence, there ſhall be a particular eſtate left in the *feme* and alſo in the *baron*; whereas the *baron* had nothing before, which cannot be; for the ſurrender is void. For when one is ſeiſed in fee, he cannot by any matter in *fact* give away the inheritance after his death, and ſo leave a particular eſtate in himſelf; but peradventure it may be done by matter of record; and of that opinion was the Court, 38. *Hen.* 6. 8. *Hen.* 7. and it is abſurd, that by a mere grant the *baron* ſhould have an eſtate for life, who had nothing before. *Secondly*, He ſaid there was an apparent fault in the pleading; for the avowant pleads, that *Margaret*

To an avowry for copyhold lands by diſcent of the ſeiſin of *A.*; a replication that *A.* and *B.* ſurrendered the land by the name of "the "reverſion," after the death of the ſaid *A.* and *B.* to the uſe of the plaintiff, is bad; for *B.* had nothing, and it leaves a particular eſtate in *A.*; and the ſeiſin ſhould have been traverſed.

Poſt. 225.
Hob. 171.
Cro. Jac. 376.
1. Burr. 272. 274.
Roll. Rep. 103.
Godb. 264.
4. Leon. 8.
Roll. Rep. 254.
1. Roll. Ab. 828.
Gilb. Ten. 260.
11. Co. 10. a.

CLAMPE *againſt* CLAMPE.

garet died ſeiſed, and the land deſcended to him; and the plaintiff in his replication traverſed the deſcent, and not the dying ſeiſed. 14. *Hen.* 8. *pl.* 23. And the avowant had judgment at the end of the term.—NOTA, It was moved, that the twelve acres could not paſs by the name of a *meſe*; but the Court gave no regard to it.

Poſt. 89.

CASE 2.

Herring *againſt* Blacklow.

Eaſter Term, 26. *Eliz. Roll* 441.

If the defendant alledges *ſeiſin*, the plaintiff cannot alledge a prior *ſeiſin* without traverſing the ſeiſin of the defendant.

REPLEVIN. The defendant avows taking the cattle damage-feaſant in a certain parcel of land, parcel of the manor of *S.* and ſheweth that Dame *Frances Jerningham* and *Henry Jerningham* were ſeiſed of the ſame manor in fee, and let the land in which, &c. to him for one-and-twenty years, and ſo avowed the taking, &c. The plaintiff, in bar to the avowry ſaith, that long time before the ſaid *Frances* and *Henry* were ſeiſed of the ſame manor, king *Henry* the eighth was thereof ſeiſed in fee, and that this land was demiſed and demiſable by copy of court roll, &c. and that king *Henry* the eighth did demiſe this land to the plaintiff by copy of court roll in fee; which matter he was ready to aver, &c. And upon this it was demurred.—GODFREY alledged the cauſe of the demurrer, for that the plaintiff in his replication ſaid, that king *Henry* the eighth was ſeiſed, &c. and demiſed to him, &c. and doth not traverſe the ſeiſin in fee in *Frances Jerningham* and *Henry Jerningham*: and it may be they came to the land by good title of *puiſne temps*, as the land might be forfeited into the king's hands, &c. And in *Carew's caſe*, 5. *Hen.* 7. one pleaded in bar a feoffment of *J. S.* and gave colour to the plaintiff; the plaintiff replieth, that long time before *J. S.* infeoffed the defendant, he infeoffed him; ſo he was ſeiſed until diſſeiſed by the defendant. This is ruled no good plea, without a traverſe or confeſſion how *J. S.* came to the land afterward.—COKE *contra*: The replication is good enough; for he hath by *nient dedire* confeſſed, that *Frances* and *Henry* were ſeiſed; and he had a good title by the copy, before their title: and ſuch a confeſſion by *nient dedire* is good. 4. *Edw.* 2. Replication accordingly.—But the Juſtices ſaid, that in the time of *Edward* the third the Judges had no great regard to pleading. WRAY, C. J. ſaid, that ſince that book the law hath been taken otherwiſe; and there is no queſtion, but where the defendant doth alledge ſeiſin in one from whom he claimeth, the plaintiff cannot alledge ſeiſin in another from whom he claimeth, before the ſeiſin of, &c. without traverſing, confeſſing, or avoiding the ſeiſin alledged by the defendant; and judgment was commanded to be entered for the avowant.

1. Leon. 78. Lut. 1343.

5. Com. Dig. 212. 5. Bac. Ab. 211.

Co. Lit. 303. a. 304.

Poſt. 278. 359. 384. 651. 754.

CASE 3.

Morton's Caſe.

Judgment recovered againſt another for the ſame injury, is a good plea in bar to treſpaſs.

TRESPASS againſt *Morton* for entering into his houſe, and taking away his goods. The defendant pleadeth the treſpaſs was done by him and *J. S.* and the plaintiff had brought treſpaſs againſt *J. S.* and recovered againſt him, and had execution, and is ſatisfied, and demands judgment if he might impeach him, &c. And upon this it was demurred.—PLOWDEN moved, that this was a good plea; for when a treſpaſs is done by two, this is joint, and it is alſo ſeveral: ſo that if the party be ſatisfied by one, this is a diſcharge againſt the other; and the treſpaſs is ſo joint, that if the plaintiff

11. Co. 5. Hob. 164. Dyer, 34. 1. Term Rep. 650.

plaintiff doth confeſs that the defendant and another did the treſpaſs, the writ ſhall abate; for it ought to be brought againſt both. 8. *Hen.* 5. *pl.* 9. 2. *Hen.* 7. *pl.* 16. *Foſter's caſe*, 21. *Edw.* 4. 22. *Edw.* 4. In 2. *Rich.* 3. a difference is taken between a treſpaſs by two, and a felony by two: for a felony by two, is always ſeveral; and a pardon of one, is no diſcharge of the other. MORTON'S CASE.

WRAY, C. J. conceived it reaſonable, that the execution and ſatisfaction by one ſhould diſcharge the other.—GAWDY *contra*: For the treſpaſs is always in itſelf ſeveral; and when the plaintiff hath recovered againſt one, and is ſatisfied for the damages he has done to him, this is nothing to the treſpaſs done by the other: but a releaſe to one is available to the other; for by the releaſe he acknowledges himſelf ſatisfied.—CLENCH. If one command three to do a treſpaſs, and they do it, and a recovery is had againſt him, and he being in execution doth ſatisfy the plaintiff, this is a good diſcharge of the others; for the commander was the principal treſpaſſer, and the others did it but as his ſervants; which GAWDY ſeemed to agree, *et adjournatur*. 2. Hawk. 547. Hob. 66. Lit. Sect. 376.

Pinner's Caſe. CASE 4.

HE was indicted, that being coroner of *Ludlow* only, *cepit inquiſitionem ſuper viſum corporis infra metas et hundredas comitat' Hereford.* And becauſe it was not alledged where the inquiſition was taken, nor by what perſons, nor their names, nor that they were ſworn, the inquiſition was held to be void, and the party diſcharged. Coroner's inquiſition muſt ſtate the place, the jurors names, and that they were ſworn.

2. Hawk. P. C. 77. Fitz. Cor. 107. S. P. C. 51.

Anonymous. CASE 5.

J. S. was indicted for entering upon a copyholder *with force*, againſt the 8. *Hen.* 6. c. 9. The force was removed, and he was reſtored to the poſſeſſion by the juſtices of the peace; and afterwards this indictment was removed into the queen's bench by *certiorari*. The party traverſed it, and it was found for him; but in the mean time a ſtranger recovered the land by a claim in nature of a writ of *droit cloſe*, in the court of the lord of the manor, and was put in poſſeſſion. The queſtion was, If the party for whom the traverſe of the indictment was found ſhall be reſtored to his poſſeſſion, againſt him that had recovered in the lord's court? And it was adjudged, that he ſhall be reſtored, for otherwiſe he ſhall not have the effect of his ſuit; and this Court ſhall take no regard of the recovery in the lord's court, *de puiſne temps*, of which they have no matter of record before them. Reſtoration of poſſeſſion in forcible entry, ſhall be preferred to an intermediate poſſeſſion, recovered in the lord's court.

Savil. 68, 141. H. P. C. 140. Noy, 119. Yelv. 99. Cro. Jac. 148.

Smith's Caſe. CASE 6.

ACTION FOR WORDS. For that whereas *R. Smith* was attainted of felony, and ſhewed that the defendant ſaid, "You," *innuendo the plaintiff*, "have done as ill, and worſe; and it will coſt you as much to be quit as it coſt him."—GAWDY ſaid, the action lieth not, for the words are uncertain; for it may be when he ſaid, "you have done as ill, or worſe," he intended he had done ſome great offence before God; and for uncertain words, an action lieth not. But the other Juſtices doubted, *et adjournatur*. —And in this term, RHODES, *ſerjeant*, moved if theſe words, "Thou art a knave, and a pillory knave," are actionable; and the Court conceived they were not (*a*). Words of uncertain import are not actionable.

Cowp. 276.

(*a*) Sed vide, Brown v. Dauks, ante 11. contra.

CASE 7.

Wencomb's Caſe.

Conveyancing.

A. maketh a feoffment to *B.* of lands, and it was covenanted by indenture between them, that if *A.* doth pay to *B.* at the feaſt of *St. John Baptiſt* forty-ſeven pounds, that the feoffment ſhall be to the uſe of *A.* and his heirs; and if he faileth of payment, and *B.* doth not pay twenty pounds at *Michaelmas*, that then alſo the feoffment ſhall be to the uſe of *A.* and his heirs, and covenanted to make further aſſurance. Afterwards both *A.* and *B.* fail of payment at the days. And in *Hilary Term* next following both the feaſts, a fine is levied to the feoffee, and no uſe expreſſed. All this was found by ſpecial verdict, and that the fine was only to the uſes of the indenture. The queſtion was, Whether the conuſee of the fine, or the heirs of the feoffor, would have the land? And it was adjudged for the heir of the feoffor.

CASE 8.

Sir John Peter *againſt* Knoll.

Treſpaſs may be laid at any day after it is committed.
5. Mod. 286. Strange, 1095. Ld. Ray. 240. Salk. 639. Cowp. 454. 828.

TRESPASS, for taking an ox, May the firſt, and ſelling it, and converting the money to his own uſe. Upon not guilty pleaded, the jury found that the plaintiff ſeized the ox as a heriot-ſervice, long time before the treſpaſs; and afterward, and before the treſpaſs ſuppoſed, the defendant as executor of *J. S.* (whoſe the ox was) took it, and ſold it, &c. and as to that, it was found that the treſpaſs was done before the day which the plaintiff ſuppoſed.—The Court held it not material, for being once a treſpaſs, it is always a treſpaſs.—To the other matter, *viz.* Whether the lord may ſeize a heriot-ſervice? WRAY, C. J. ſaid he might, for this is a ſervice which lieth not in *render*, but in *prender*; and the lord is to have the beſt beaſt, and it is at his election which he will take for the beſt; and it is inconvenient to put him to diſtrain, when he may ſeize; and ſaid it hath been ſo adjudged.

Heriot ſervice may be ſeized for, or diſtrained.
Poſt. 589. Bro. Her. 6. Co. Lit. 83. 162. Cro. Car. 260.

CASE 9.

Harris' Caſe.

Indictment quaſhed for want of addition.
Poſt. 148. Cro. Jac. 531. 2. Hawk. 328.

HE was indicted upon the 8. *Hen.* 6. c. 9. The indictment was removed by *certiorari*; and becauſe the indictment was, that he made entry with force, and doth not alledge of what vill or county the party was, the indictment was abated; for proceſs of outlawry lieth upon it.

CASE 10.

Hill's Caſe.

Pleading.

EJECTIONE FIRMÆ. And declared of a leaſe made to him by *J. S.* The defendant conveyeth to himſelf a title by leaſe, before that leaſe; and it was held no plea, for it mounts but to a general iſſue.

CASE 11.

Anonymous.

The return of "no ſuch vill" to a *ven. fac.* muſt be accompanied by a panel from the *body of the county*.
Poſt. 201. 266. 6. Co. 14. b.

ERROR upon a judgment given againſt the father. The defendant alledged, that the plaintiff had an elder brother in full life at ſuch a place, *viz.* in *M.* in the county of *Stafford*. Upon this they were at iſſue. The *venire facias* was of *vicineto de M.* and the ſheriff returned there was no ſuch vill. The court held clearly it was no good return, for he ought to make the panel *de corpore comitatûs*. 37. *Hen.* 6. *pl.* 11. *Accord.* (*a*).

(*a*) Now by 4. and 5. Ann. c. 16. in civil ſuits, and 24. Geo. 2. c. 18. in penal actions, every *venire facias* ſhall be awarded from the *body of the county* in which the action is triable. See *Mr. Hargrave's* note, Co. Lit. 125. a.

Grave *againſt* Grave.

CASE 12.

PER CURIAM, *abſente* WRAY, *chief juſtice*. If an infant brings treſpaſs by guardian, and afterwards he was nonſuit, he ſhall render no coſts.

An infant ſhall not pay coſts. 1. Com. Dig. 553.

1. Bac. Ab. 517. 1. Stra. 708. 2. Strange, 1217. Sed vide 1. Barnes, 105. and Sayer's Coſts, 93.

Long's Caſe.

CASE 13.

A NISI PRIUS was granted after iſſue, and afterward a *ſuperſedeas* was awarded; and, notwithſtanding, the party proceeds with the *niſi prius*, the Juſtices not knowing of the *ſuperſedeas*, and the iſſue was tried for the defendant; and now this term the plaintiff prayeth a new *niſi prius*, and upon the ſame *venire facias* that the former was, for the trial upon the firſt was void, and *coram non judice*, for the Juſtices had not power to proceed by reaſon of the *ſuperſedeas*. And a *niſi prius de novo* was granted; but the Juſtices ſaid, that the plaintiff is to take good heed, that he hath none of the principal pannel which paſſed in the firſt trial, for it is a principal challenge that he was in the firſt trial.

A ſecond *niſi prius* granted after judgment, with a caution not to impannel any of the former jury.

Cro. Jac. 43.

Anonymous.

CASE 14.

PERIAM, *Juſtice*, ſaid, he had ſeen a precedent in the time of king *Henry* the eighth, that where a citizen of *London* ſued another citizen in the common bench, and the mayor and aldermen of *London* would have him put the matter to compromiſe, which he refuſed; whereupon they did disfranchiſe him, and he ſhewed this matter to the Court; and thereupon they directed their writ to the mayor, *&c.* to reſtore him to his franchiſe, they aſſeſſed a fine of an hundred marks upon every of them that were parties to the disfranchiſement, which they payed, as appeareth by the record, and the citizen was reſtored to his franchiſe.

A *mandamus* lies to reſtore a citizen of London *diſfranchiſed* for ſuing a citizen.

11. Co. 98. a. 3. C. Dig. 409. Burr. 517. 723. Cowp. 378. 413. 523. 1. T. Rep. 423. 2. T. Rep. 177.

Anonymous.

CASE 15.

NOTA. The laſt day of this term a precedent was ſhewn to the Court, which was *Mich.* 5. *Hen.* 5. *roll* 484. An *audita querela* was brought in this court; and becauſe the record was not brought into court, ſo as the party might have execution if the matter was found for him, for this cauſe the judgment was, that *querens nihil capiat per breve.*

In *audita querela* the record muſt be brought into court.

Sym's Caſe.

CASE 16.

NOTA. It was held by the Juſtices, that if two joint-tenants be of a term, and the one grants parcel of the term to a ſtranger, by this the jointure of all is ſevered.—Yet MANWOOD agreed, that if a man be poſſeſſed of a term in the right of his wife, and grants parcel of it to another, that, after the death of the *baron*, the *feme* ſhall have the reſidue of the term that was not granted, and it ſhall be only an alteration of what was granted.

A grant of parcel by one joint-tenant is a ſeverance, but not if a huſband grant part of a term he has in right of his wife.

Poſt. 279. Co. Lit. 46. b. Moor, 522. 2. Vern. 396. 3. Atk. 20. 1. Salk. 158.

Maldon's Caſe.

CASE 17.

NOTA. If one ſaith to me, "You ſhall have a leaſe of my "lands in *D.* for twenty-one years, paying therefor ten ſhil- "lings *per annum*; make a leaſe in writing, and I will ſeal it:" this was agreed to be a good leaſe by *parol*, although no writing be made of it, for the intent of the leſſor is ſufficiently expreſſed, and the making of it in writing is but for further aſſurance (*a*). *Ex relatione* LEWIS.

By what words a parole leaſe may be made.

Poſt. 486. Moor, 8. 861. Co. Lit. 1426. 2. Bl. Rep. 974. 1. T. Rep. 736. 3. B. A. 119. 421. Cowp. 473. 2. T. Rep. 743.

(*a*) By 29. Car. 2. c. 3. leaſes of lands muſt be in writing, and ſigned by the parties or their agents duly authoriſed; otherwiſe they will operate only as leaſes at will, except leaſes not exceeding three years.

Michaelmas Term,

26. and 27. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sr John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

1 A proviſo in a deed of ſettlement authoriſing the covenanter to limit any part of the ſettled eſtate for lives or years, will not enable him to make an unreaſonable leaſe, in preference of one of his children. Poſt. 197. S. C. Moor, 144. 372. S. C. 1. Co. 175. S. C. Jenk. Cent. 247. Co. Ent. 30. 1. Ch. Caſ. 161. 264. 246. 3. Ch. Caſ. 91. Powel on Powers, 210. Cowp. 595. 651. 657. 714. 2. Term Rep. 241. 380. 781. Doug. 477. 2. Brown Caſ. Ch. 450.

Anthony Mildmay and Grace his Wife *againſt* Standiſh.

ACTION SUR LE CASE. The plaintiffs declared that they were ſeiſed of the manor of *Sacoke*, and had ſpeech with *I. S.* concerning the making of a leaſe to him for twenty-one years, for which he was to give 100l. for a fine: that the defendant knowing of it, ſaid to *I. S.* "That one *Jo.* "*Talbot* and *Oliffe* his wife had a leaſe of it, not expired, for one "thouſand years;" and theſe words were ſpoken by the defendant, to the intent to take from the plaintiff the fine agreed upon; and that by reaſon of theſe words *I. S.* would not accept of the leaſe. —The defendant pleads in bar, that *Sir Henry Sherrington* was ſeiſed of the land in fee, and by indenture covenanted with, &c. *Vide* 1. *Co.* 175. *and Coke's Entries* 30. *the whole pleading of the caſe* (*a*). —It was argued *Paſc.* 26. *Eliz.* by FENNER and GAWDY, *ſerjeants*, for the plaintiff, and by WALMSLEY and PUCKERING, *ſerjeants*, for the defendants; and afterwards, *Trin.* 26. *Eliz.* GAWDY prayed judgment for the plaintiff.—ANDERSON, C. J. ſaid, they were all agreed that judgment ſhall be given for the plaintiff; and ſhewed briefly that the cauſe of their judgment was, that this is an unreaſonable leaſe, and not warranted by the *proviſo*; and it was adjudged accordingly.—Afterwards *Mich.* 26. & 27. *Eliz.* a writ of error was brought in the queen's bench, and after argument by the counſel, WRAY, C. J. ſaid, that they were agreed to affirm the judgment; and that the reaſons that moved them were principally three.—Firſt, By the indenture there are equality of eſtates in the land, and equal parts conveyed to the three daughters, with a proviſo by his will in writing, to limit any part for payment of

(*a*) *Sir Henry Sherrington* was ſeiſed among other eſtates, of the manor in queſtion in fee, and had iſſue three daughters: *Grace*, married to *Anthony Mildmay*; *Oliffe*, married to *John Talbot*; and *Urſula*, married to *Thomas Sadler*. *Sir Henry* covenanted *pro paterno amore et meliori manutentione* of his ſaid daughters, to ſtand ſeiſed of his eſtates to the uſe of himſelf for life, the remainder to his three daughters ſeverally in tail; the reverſion to his own right heirs in fee; and if any of his ſaid three daughters ſhould die without iſſue, then her portion to be by moieties to the ſurvivors: PROVIDED ALWAYS, "That it ſhall be lawful for the "ſaid *Sir Henry*, by his will in writing, to "limit any part of the ſaid lands, for any "life, lives, or *years*, for the payment of "his debts, performing of his legacies, "preferment of his ſervants, or any other "*reaſonable* conſiderations as to him ſhall "be thought good." *Urſula* died without iſſue, whereby her portion came to *Grace* and *Oliffe*. *Sir Henry* by his will, for the advancement of his daughter *Oliffe* and *her huſband*, limited a great part of *Grace*'s portion of his eſtates, including the manor, to *Oliffe* and *her huſband*, in tail male, for 1000 years, without the reſervation of any rent. And whether this *limitation* was good in law, by force of the *proviſo*, was the queſtion. Moor, 144. 1. Co. 175.

his debts and legacies, preferment of his ſervants, or other reaſonable conſiderations as to him ſhall ſeem good; and this demiſe for a thouſand years is not reaſonable; for the intent of the indenture was the advancement of his blood, &c. and for the advancement of *Grace* and *Oliffe* his daughters. And this leaſe for one thouſand years can be no advancement to the blood of *Sir Henry Sherrington*, for it ſhall go to the huſband of *Oliffe* if he ſurvive; and if he doth not, it ſhall go to the executor, &c. of *Oliffe* after her death, and by no poſſibility can this chattel go to the heirs or blood of *Sir H. Sherrington*, but ſhall go to ſtrangers (*b*).—Secondly, *Grace*, the wife of the plaintiff, is to have a third part, by the firſt part of the indenture; and by this leaſe all her intereſt in effect is taken away, which is againſt the intent of the indenture; and the conſideration was the preferment of *Grace*, that was married to the plaintiff, which was a great advancement to her, and for the preferment of the heirs males, and heirs generals, and by this leaſe it is wholly taken away; as if one giveth land in tail, provided he ſhall take the profits of parcel of the land for a thouſand years, this is a void proviſo, for by common preſumption it taketh away the benefit and intereſt of the grantee in that parcel (*c*).—And Thirdly, This word "*reaſonable*" is greatly to be conſidered, and ſhall be expounded ſtrictly, eſpecially in a proviſo. For if by this proviſo *Sir H. Sherrington* had given to a ſervant, being his yeoman, ten pounds *per annum* for life, this had been reaſonable; yet if he had given him an hundred pounds *per annum*, it had been unreaſonable: for in the firſt caſe, although ten pounds *per annum* be a great ſum, yet it may be the ſervant was ſo faithful and honeſt as he might deſerve it. Alſo every grant ſhall be expounded as the intent was at the time of the grant; as if I grant an annuity to *J. S.* until he be promoted to a competent benefice, and at the time of the grant he was but a mean perſon, and afterward is made an arch-deacon, yet if I offer him a competent benefice, according to his eſtate at the time of the grant, the annuity doth ceaſe. And for theſe reaſons and others known to them the judgment was affirmed.

MILDMAY *againſt* STANDISH.

(*b*) Moor, 145. Cro. Car. 181. 2. Leon 138. Owen, 40. 1. Lev. 30.

(*c*) Cro. Car. 400. Cro. Jac. 178. Hob. 159. Moor, 372. 1. Bac. Ab. 412. Fitzg. 299. 2. Vezey, 644. Cowp. 266. 1. Co. 177. a. Skinn. 532. Shep. Touchſt. 252.

Croker *againſt* Trevithin.

CASE 2.

THE caſe was, Lands were given in tail, upon condition if the donee or his heirs diſcontinue the land, the donor ſhall re-enter. The donee hath iſſue two daughters, and dieth. The daughters have iſſue two ſons, and die. One of the ſons diſcontinues the land to another; and it was held by the Court to be a breach of the condition.

On breach of condition by one of the heirs of the donee's iſſue, the donor ſhall re-enter. Poſt. 163.

Litt. Sec. 362. 10. Co. 39. Co. Lit. 223. Moor, 39. Vent. 322. 1. Leon. 292. Fearne's Con. Rem. 187.

The Aldermen of Cheſterfield's Caſe.

CASE 3.

THE queen maketh a leaſe for years of land to the men of *Cheſterfield*, rendering rent. The grant was to them by the name of the "Aldermen of *Cheſterfield*;" and they by the name of "Aldermen of *Cheſterfield*" grant all their intereſt to *Clarke* in the ſaid land. It was agreed by the Court, that the grant by them was void; for they, by the grant of the queen, have capacity to take, but not to grant the land to another.

The grantee of the crown cannot grant over. Poſt. 363. Co. Lit. 3. a. 1. Roll. Ab. 513.

Hilary Term,

27. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt.* *Chief Juſtice.*
Hugh Wyndham, *Eſq.*
Thomas Meade, *Eſq.* } *Juſtices.*
Sir William Periam, *Knt.*
Sir John Popham, *Knt.* *Attorney General.*
Sir Thomas Egerton, *Knt.* *Solicitor General.*

CASE 1.

Thomas James *againſt* Landon.

Trinity Term, 24. Eliz. Roll 1232.

Eſtoppels ſhall endure no longer than the leaſe by which they are created.

Co. Lit. 47.
4. Co. 54.
Moor, 181. 96.
2. Leon. 159.
8. Co. 44.
1. R. Ab. 877.
3. Ba. Ab. 443.
1. Vent. 358.
Carth. 247.
Salk. 275.
S. Touch. 274.
Dougl. 159.
2. T. Rep. 171.

SECOND DELIVERANCE. The parties were at iſſue, if it were the freehold of the plaintiff or of the defendant.—The jury found a ſpecial verdict, that *J. S.* was ſeiſed of the land and infeoffed *George James* in fee, who died ſeiſed, and the ſame deſcended to the plaintiff; and that afterward the defendant let the land to the plaintiff by indenture, for twenty-one years, and that the twenty-one years are expired, and prayed the diſcretion of the Court, &c.

The Juſtices ſhewed their opinion briefly.

PERIAM, *puiſne Juſtice.* This eſtoppel ſhall endure no longer than the leaſe; for after the term is expired, the indenture is but an eſcrow, and a piece of parchment or paper *(quære de hoc,* for covenant or debt may be brought upon the indenture after the term expired, &c) And he ſaid the difference hath always been between an eſtoppel by record and by indenture; for if one brings an action of waſte againſt a tenant in fee-ſimple, and ſuppoſeth he held of him for years, &c. and the tenant pleads *nul waſte fait,* this eſtoppel remaineth after the years expired.

WYNDHAM accorded, for it is not reaſonable that by this negligence another ſhould have his land for ever.

MEADE accordant, and ſaid it was ruled in *Bright*'s caſe, that the jury are not bound to find an eſtoppel.

ANDERSON, C. J. After the term expired the plaintiff may confeſs and avoid the leaſe.—And afterwards the plaintiff had judgment. *Vide* 4. *Co.* 54.

NOTA. *Mich.* 9. & 10. *Eliz. Pledal's caſe, in B. R.* The caſe was, A leaſe was made to father and ſon for eighty years, and afterward the father let the land to the ſon for fifty years by indenture, upon condition that if the father paid twenty pounds at ſuch a day, &c. the leaſe ſhould be void, as if it were never made. The condition was performed, the father enters, and deviſeth the land to two others of his ſons, and dieth: they enter upon the ſon

ſon who took the leaſe, and he re-ouſteth them, and they bring an *ejectione firmæ*. This matter was given in evidence at *niſi prius* in the county, and the jury found againſt the plaintiff; upon which they brought an attaint, and aſſigned the *faux ſerement* in this, that they found againſt them, whereas they ought to find for them. The opinion of the Juſtices was, that the ſon who took the leaſe was eſtopped to claim any other eſtate than for fifty years, and the eſtoppel continued after the fifty years expired; and thereupon the grand jury found for the plaintiffs, and they recovered their term and damages. *Ex relatione* LEWIS.

JAMES *againſt* LANDON.

Co. Lit. 227. a. Poſt. 140.

NOTA. If one taketh a leaſe of his own land of an infant or *feme covert* by indenture, this is no eſtoppel; for in eſtoppels both parties are to be eſtopped, which the infant and *feme covert* are not.

Co. Lit. 352. a. 3. Bac. Ab. 442. 1. Wood Con. 235.

Eaſter Term,

27. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Hugh Wyndham, *Eſq.*
Thomas Meade, *Eſq.* } *Juſtices.*
Sir William Periam, *Knt.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Morris *againſt* Smith and Paget.

Trinity Term, 25. Eliz. Roll 731.

A manor cannot begin at this day; but if a lord, being ſeiſed in fee of the manor of *A.* which extends to *B.* and ſeveral other towns, and he grants all *his* manor of *B.* in the town of *B.* with all his *hereditaments* in *B.* the manor of *A.* is well divided, and the grantee may hold a court leet in *B.*

Ante, 19. Poſt. 103. 150. 210. 299. 443. 522. Co. Lit. 58. 324. 2. R. Ab. 122. Owen, 4. 138. 1. Bulſ. 54. Winch. 46. Cro. Car. 308. 4. Co. 26. b. 5 Co. 11. Plowd. 104. Savil. 113. 2. Mod. 2. Gilb. Ten. 210. 2. T. Rep. 415.

LINCOLN. IN REPLEVIN. A ſpecial verdict was given that *Sir Francis Aſcough* was ſeiſed in fee of the manor of *Caſtor*, which did extend into the towns of *North-Kelſey*, *South-Kelſey*, *Holton*, *and Griſby*, and that in every of the ſaid towns he had demeſne land, and ſeveral freeholders which held of him, as of the ſaid manor; and that MORRIS *the plaintiff* was ſeiſed of the lands in which, &c. and they did lie only in the town of *North-Kelſey*, and held them of the ſaid *Sir Francis*, as of his manor of *North-Kelſey*, by fealty, &c. and ſuit at court *de tribus ſeptimanis in tres ſeptimanas* yearly: that *Sir Francis* being ſo ſeiſed, &c. by his deed indented and enrolled, &c. bargained and ſold to *Ralph Bard*, eſquire, in fee, "*totum illud ſuum manerium ſive dominium de North-Kelſey* in *North-Kelſey*, and all his lands, tenements, rents, reverſions, ſervices, wards, eſcheats, &c. *et omnia alia ſua regalitates, conſuetudines, et hæreditamenta quæcunque ſituat' et exiſtent' in North-Kelſey*," and that *Jo. Morris* being the tenant of the land in which, &c. *Tho. Smith* and others, freeholders in the ſaid town of *North-Kelſey*, attorned to the ſaid *Ralph Bard*; and if *Ralph Bard* had a manor in *North-Kelſey* to hold a court, they prayed the diſcretion of the Court.—NOTA. The diſtreſs was for not doing ſuit at court.—PERIAM, *Juſtice*, held that *Bard* had no manor in *North-Kelſey*, for *Sir Francis Aſcough* had no ſuch manor, but his manor was the manor of *Caſtor*. And if I have a manor in two counties, and have demeſnes and ſervices in both, and I grant my manor in one county, the grantee hath no manor, for I had no ſuch manor; and in conveyances things muſt paſs by their proper names, and a manor cannot be made at this day; neither by a common perſon nor by the queen. And he ſaid a caſe was adjudged in the time of queen *Mary* to this purpoſe. The ſtatute of 11. *Edw.* 3. c. 4. ordained that the *king's* eldeſt ſon ſhall be *Duke of Cornwall*: afterwards the *king* by his letters patents did annex the manor of *M.* in the county of *Wilts* to the ſaid dutchy. *King Hen.* 8. (there being then no prince) had the dutchy in his own hand, and let the ſaid manor of *M.* to *J. S.* for twenty-one years, and afterward *Prince Edward* was born, and *Duke of Cornwall* by birth: it was adjudged the leaſe was good; for *king Edward* could not by

his letters patents make the manor parcel of the dutchy, for that muſt be by preſcription. And if the queen granteth land to hold of the manor of *Greenwich* by certain ſervices, theſe ſervices are not parcel of the manor but by reputation; and a manor is a thing entire, which cannot be divided but by act in law, as between partners, 26. *Hen.* 8. *pl.* 4. But if two joint-tenants make partition at this day of a manor, and each of them hath demeſne and ſervices, yet each of them hath not a manor, nor can keep ſeveral courts, but muſt both keep one court. In the caſe at bar, there never was a court kept for the manor of *North-Kelſey*; and if I have a manor which doth extend into *A. B.* and *C.* and demeſnes and ſervices in all the towns, and I grant all the manor in *A.* the grantee hath a manor, but I have none in the other towns, but have the ſervices in groſs, 9. *Edw.* 4. But if the manor of *D.* extend into *A. B.* and *C.* and in each of them there be demeſnes and ſervices, and I grant all my manor in *B.* the feoffee hath no manor, but the manor remaineth with me.

MEES *againſt* SMITH and PAGET.

WYNDHAM, *contra.* Though a manor cannot be made at this day, yet a manor may be divided; and although it was objected that the grant is "*totum ſuum manerium de North-Kelſey*," and ſo the ſentence is falſe, for he had no ſuch manor; yet he ſaid the grant was good, for the word "*ſuum*" was ſuperfluous: as if an executor hath power to ſell the manor of *D.* and he ſells it by the name of all *his* manor of *D.* yet the ſale is good; ſo if *ceſty que uſe* before the ſtatute had ſold "*totum ſuum manerium de D.*" and here is no creation of a manor, but a dividing of it. And although a ſeigniory or appendancy cannot be made at this day, yet if an advowſon be appendant to a manor, and the lord grants part of the manor with the advowſon to *J. S.* it is now appendant to that part, 43. *Edw.* 3. *pl.* 12. And the caſe of 9. *Edw.* 4. is, that by the grant or recovery of a manor in one town, the feoffee or recoverer of the manor in one town, hath a manor there, and the grantor, &c. hath a manor in the other; and the grant of the manor OF *North-Kelſey* and of the manor IN *North-Kelſey* is all of one effect; and a court baron is not tied to any particular place, but may be held ſometimes in one place, and ſometimes in another. As to the objection, that if I may make of one manor two manors, by the ſame reaſon I may make twenty. He ſaid, So I may, and it is no miſchief, and it is better for the tenants and ſuitors the nearer the court is to them.

Co. Lit. 58. 1. Leon. 56. 1. Bl. Com. 97.

ANDERSON, C. J. accords. He conceived the conveyance in ſubſtance was good enough, yet the form of it might have been better and more conſonant to the law. If the grant had been "*totum manerium ſuum de Caſtor* IN *North-Kelſey*," the manor had more aptly paſſed: here the grant is of the manor, and of all his hereditaments in *North-Kelſey*, and by this word "*hereditament*" the manor will paſs. He agreed that a manor cannot be made at this day, and that the queen cannot make a thing parcel of a manor at this day; as if ſhe grants lands to hold of her as of her manor of *Greenwich* by a certain rent, this rent is not parcel of the manor.—NOTA. *Mr. Bard* ſaid his conveyance was made by *Wray* and *Manwood*, and that their opinion, and the opinion of *Carell* of the Inner-Temple, was clear that the grant was good to convey a manor in *North-Kelſey*; and that *Carell* held, that by force of this grant he might keep a court-leet in *North-Kelſey*, for there was a leet within the manor of *Caſtor*, and this might be well divided.

Trinity Term,

27. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Hugh Wyndham, *Eſq.*
Sir William Periam, *Knt.* } *Juſtices.*
Francis Rhodes, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Lovelace *againſt* Lovelace.

A deviſe to one and his *eldeſt* iſſue-male paſſes an eſtate for life; to one and his iſſue-male, paſſes an eſtate tail. Poſt. 478.

WASTE. The caſe was, *J. S.* being ſeiſed in fee of land, deviſed it to *J. D.* and to his *eldeſt* iſſue male (he having no ſon at that time). It was adjudged no eſtate tail, but for life only; and if he then had a ſon, it was all one: but a deviſe to one and his iſſue male, is an eſtate tail; but here the word *eldeſt* will not permit that conſtruction.

Moor, 371. 2. Leon. 35. 1. Ander. 132. Co. Lit. 27. b. 7. Co. 41. b. Savil. 75. Caſ. temp. Hard. 160. Ld. Ray. 203. Stra. 731. 3. Com. Dig. 26. Powel on Dev. 359. 361. 1. Bur. 46. Dougl. 417.

CASE 2.

Edward Hyde *againſt* Morley.

Michaelmas Term, 26. and 27. Eliz. Roll 1602.

If a conuſor of a ſtatute merchant infeoffs, and before execution the conuſee releaſes all his right to the feoffee, he cannot afterwards extend upon the feoffee. Poſt. 552. Cro. Jac. 449. 8. Co. 154. 2. R. Ab. 470. 1. And. 133. 2. R. Ab. 313. Co. Lit. 265. 291. 10. Co. 47.

AUDITA QUERELA againſt the defendant for ſuing execution againſt the plaintiff, of the manor of *Wakeley* in the county of *Hertford*, upon a ſtatute merchant of a thouſand pounds, which one *Edward Halſide* did acknowledge to him; and ſhews that the ſaid *Halſide* was at the time of the ſtatute ſeiſed of the ſaid manor, and afterwards ſold it to the plaintiff; and the plaintiff being thereof ſeiſed, the defendant by his deed, &c. "*remiſit et relaxavit*" *(to the plaintiff)* "*totum et quodlibet jus, titulum, intereſſe, et demanda quæcunque the ſaid Morley habuit, habet, vel habere debuit, vel debet, de et in manerium prædictum, &c. necnon omnes et omnimodas actiones, ſectas, executiones, et demanda quæ ipſe, vel hæredes, executores, &c. tunc habuere, vel habere poſſint, de aut verſus præmiſſa, vel verſus prædict. Ed. Hyde, &c. pro vel concernent' aliquam materiam ratione præmiſſor.*" &c. And upon this it was demurred.

The caſe was argued by FENNER *for the plaintiff*, and WALMSLEY *for the defendant*; and it was adjudged that this releaſe was a good bar of the execution upon the ſtatute. *Vide Paſ.* 39. *B. R. plac.* 2. *contra adjudged.*

Clare

Clare *againſt* Pepys.

CASE 3.

WASTE. And declared that *P.* was ſeiſed in fee of the land, and made a feoffment to the uſe of himſelf for life, the remainder to the uſe of *A.* the mother of the plaintiff in fee; that *A.* died, and the remainder deſcended to the plaintiff; and for waſte done after her death the action was brought.—The defendant pleaded that he was ſeiſed in fee *abſque hoc*, that he made a feoffment, &c. The jury found that he made a feoffment, and that it was to the uſe of himſelf for life, without impeachment of waſte, the remainder *ut ſupra*.

It was moved, that this verdict was for the defendant; and although it was not found that he was ſeiſed in fee, yet it being found that he held for life without impeachment of waſte, it appeared to the Court that the plaintiff hath no cauſe of action. And of that opinion was WYNDHAM; but the other Juſtices *contra*: for they ſaid, the jury have found more than they needed, and compared it to the caſe of 12. *Hen.* 8. *pl.* 1. where the defendant hath matter of juſtification, and doth not plead it: and the plaintiff had judgment.

A verdict which finds matter that is not in iſſue, is bad.

2. R. Ab. 692. 3. Leon. 80. Hob. 53. Cro. Jac. 140. Cowp. 826. Dougl. 377. 730. 1. Term Rep. 447. 659.

Co. Lit. 282 a.

Poſt. 69. 79. 140. 283. 431. 481. 506. 634.

Fox's Caſe.

CASE 4.

NOTA. *Juſtice* RHODES ſaid, that in that caſe it was adjudged, where a miniſter was deprived for an offence *tempore parliamenti*, and the offence was afterwards pardoned by parliament, and then the parliament ended, the deprivation was utterly void; for the pardon relateth to the firſt day, and the party need not ſue to reverſe the deprivation.

A ſtatute pardon takes effect from the firſt day of the ſeſſion.

Poſt. 789. 768. 778.

6. Co. 14. Latch. 22. Cro. Car. 67, 114. 2. Hawk. 558.

Anonymous.

CASE 5.

DEBT was brought againſt *J. S.* as executor, and pending this action *J. D.* brought debt againſt him as adminiſtrator for a true debt (whereas in truth he was executor). *J. S.* confeſſed the latter action, and pleads this recovery in bar of the firſt action.

It was reſolved to be no good plea: *Firſt*, Becauſe the recovery was had againſt him as adminiſtrator, and ſo is void, although this had been only a plea to the writ; and a ſtranger ſhall not falſify that which is only to the writ. *Secondly*, He that firſt ſueth ſhall firſt be ſerved, and the executor might have pleaded the firſt action againſt him that brought the ſecond.

An *executor* cannot avail himſelf of a judgment which he has confeſſed in an action againſt him as *adminiſtrator*, pending the ſuit to which he pleads it.

Poſt. 471.

Dr. & St. 77. a.

Michaelmas Term,

27. and 28. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt.* *Chief Juſtice.*
Hugh Wyndham, *Eſq.*
Sir William Periam, *Knt.* } *Juſtices.*
Francis Rhodes, *Eſq.*
Sir John Popham, *Knt.* *Attorney General.*
Sir Thomas Egerton, *Knt.* *Solicitor General.*

CASE 1.

Sidnam *againſt* Worthington.

Aſſumpſit will lie on a ſubſequent promiſe, for money paid as ſurety in conſequence of a precedent requeſt, although the conſideration is executed.
Poſt. 59. 94. 194. 138. 282.
Yelv. 41.
Cro. Jac. 19.
Dyer, 272.
2. Ro. Ab. 11.

ASSUMPSIT. And declares, that whereas one *Hulledge* was ſued in the queen's bench by *Cheeke*, and the plaintiff, at the inſtance of the defendant, became ſurety for him; that *Cheeke* recovered, and had execution againſt the plaintiff; the defendant afterwards promiſed the plaintiff, that if *Hulledge* did not pay the money which the plaintiff had paid to *Cheeke*, that the defendant would pay it (*a*); and avers that *Hulledge* did not pay it, nor the defendant upon requeſt, &c.

Upon the firſt motion, WYNDHAM and ANDERSON held the action did not lie, becauſe the promiſe was not made at the time of the requeſt. ANDERSON ſaid, that if I promiſe one that hath ſerved me, I will give him ten pounds, it is *nudum pactum*.

PERIAM and RHODES *contra*. RHODES ſaid, in the caſe put by ANDERSON, if I require one to ſerve me, and he doth ſo for one year, and after the year I promiſe him, in conſideration he hath ſerved me, to give him ten pounds, an action lieth. But if one agreeth to ſerve me for a year for twenty ſhillings for his wages, and after the year I pay him the twenty ſhillings, and in conſideration of his ſervice do promiſe to give him twenty ſhillings more, this is no conſideration.

The principal caſe being moved again, at another day, all the Court held it a good conſideration, by reaſon of the requeſt precedent; and the plaintiff had judgment.

(*a*) By 29. Car. 2. c. 3. where a man undertakes to anſwer for the debt, default, or miſcarriage of another, no *verbal promiſe* ſhall be ſufficient to ground an action on, but ſome note or memorandum of it ſhall be made in writing, and ſigned by the party to be charged with it.

CASE 2.

Green *againſt* Ardene.

The validity of a *ſummons* ſhall be tried by the court by witneſſes.
9. Co. 30. b.
Plowd. 2.

DECEIT for non ſummons in a *formedon* in remainder. The ſummoners and veyors were examined by the Court, as it was held they ought to be, and not by the clerks, whether they ſpake the words or the bailiff, and at what time; and it appeared they did it after ſun-ſet; and by all the Court the ſummons was not well made. But they ſaid, that an arbitrement made in the night was good.

NOTA.

GREEN *againſt* ARDENE.

NOTA. It was ſo adjudged between *Franklin* and *Davies*, *Intratur Mich.* 12. & 13. *Eliz. Rot.* 1330. in this court, where in debt upon an obligation conditioned to ſtand to the award of *ſerjeant Lovelace* and *Manwood*, ſo as the ſaid award be made before the ninth day of October, &c. and it was made the eighth day of October, at ten of the clock in the night, and ruled good; for *dies naturalis* comprehends the day and night. And *Paſch.* 26. *Eliz.* in this court, between *Samms* and others, where the condition of the obligation was to ſtand to the award of *Mr. Lewknor*, ſo as the ſaid award be made before the 21ſt day of July, &c. ready to be delivered to the parties requiring the ſame; and he made the award upon the 20th of July, at ten of the clock in the night: and the making of the award in the night was ruled good; but the doubt was, becauſe the condition was "*ready to be delivered to the* "*parties requiring the ſame*;" and it was not a ſeaſonable time to require it in the night. And FLEETWOOD ſaid in the principal caſe, that it hath been adjudged, that a letter of attorney being to deliver ſeiſin, and he doth it in the night, that it was good.

Livery of ſeiſin, and an award made in the night are good. Co. Lit. 135. a. Poſt. 676. Bract. 64. p. 264. Britton, 209. 1. Saunders, 286.

Brightman *againſt* Keighley.

CASE 3.

DEBT againſt the defendant as executor to *J. S.* He pleaded "fully adminiſtred," &c.

Upon a ſpecial verdict, it was found that *J. S.* made the defendant his executor, being then within age; and thereupon the ordinary committed adminiſtration to *A.* and *B.* who adminiſtred; and that they had in their hands, when the defendant came to his full age, of the goods of the teſtator, ſix hundred pounds; and the defendant at his age proved the will, and then releaſed to *A.* and *B.* all actions. And it was adjudged it was aſſets.

If an executor releaſe an account, ſo much as appears due thereon ſhall be aſſets. Poſt. 264. 671. Hob. 66. Godb. 29. 1. And. 138. 4. Leon. 102. 5. Co. 27. b. 1. Com. Dig. 400. 251. 254. 2. Bac. Ab. 418. 2. Vern. 299. 1. Wood's Con. 139.

ANDERSON, C. J. The doubt was, becauſe it was uncertain what he releaſed, and for that only an account lieth: but here the certainty appeareth by the verdict.

PERIAM ſaid, If an executor doth releaſe an account, and it is not certain what he ſhall recover, it is not aſſets; but if it can appear, or be proved that ſo much was due, it is aſſets. For the law preſumeth he hath received ſo much as he doth releaſe; and the plaintiff had judgment.

NOTA. RHODES, *Juſtice*, ſaid, that in 17. *Eliz.* it was ruled, that where one made his laſt will, and by it did will, that none ſhall have any dealing with his goods until his ſon came to the age of eighteen years except *J. S.* that by this *J. S.* was executor during the minority of the ſon: and that it hath been adjudged, that whereas one upon his death-bed ſaid to his wife, that ſhe ſhall pay all and take all, by this ſhe was executrix.

What words will conſtitute an executor. Poſt. 164. Went. 12, 13. 19, 20. Bro. Ex 98. Dyer, 4. *in marg.* Moor, 12. 3. Leo. 3. 1. Roll. Abr. 889. 1. Leo. 229.

Lady Rich *againſt* Lord Rich.

CASE 4.

COVENANT. The caſe was, *Lord Rich* covenanted, that certain lands conveyed to the plaintiff for her jointure, are of the value of one thouſand pounds *per annum*, and ſo ſhall continue, notwithſtanding any act done, or to be done by him.

What ſhall be conſidered a breach of covenant.

The

RICH *against* RICH.

The action was brought, for that the lands were not of the yearly value of one thousand pounds: and it was adjudged against the plaintiff; for the words, "notwithstanding any act," extend as well to the time of the covenant made, as to the time future: and though they were not then of that value, the covenant was not broken, except some act done by him were the cause of it.

Post. 615. 762. Cro. Car. 107. 496. Cro. Jac. 644. Shep. Touch. 166. Lit. Rep. 80. 1. Wood's Con. 404, 405. 1. Ld. Ray. 365. 2. Ch. Rep. 140. Cowp. 125. 1. Term Rep. 671.

CASE 5.

Dale's Case.

In *deceit* for selling goods *as his own*, it must be averred that the defendant *knew* the fact to be false.

Cro. Jac. 474. Show. 68. 1. Roll. Rep. 275. 1. Salk. 210. Dougl. 158. 3. Term Rep. 51.

DECEIT. For that the defendant sold to the plaintiff certain goods as his own goods, *ubi revera* they were the goods of a stranger. It was alledged that the action did not lie, because it was not alledged that the defendant *sciens* that they were the goods of a stranger. And for that reason PERIAM and WYNDHAM held the action did not lie; but if it had been so alledged, the action did lie; for it may be, the defendant did know no otherwise but that they were his own goods; but if he had affirmed they were his own goods, then the action would lie.

ANDERSON *contra*, for it shall be intended, that he that sold had knowledge whether they were his goods or not, 42. *Ass.* 8. And it was afterwards adjudged against the plaintiff.

CASE 6.

Reynolds' Case.

In what case an *audita querela* shall be allowed.

Post. 439. 3. Co. 52. b.

AUDITA QUERELA. For that he being in execution, was suffered to go at large, and was afterwards taken again; and the Court would not allow it: but then *Puckering* alledged, that the plaintiff had witnesses to prove that he paid the money when he was at large. And the witnesses being sworn, and the truth appearing to be so, the *audita querela* was allowed.

CASE 7.

Beverley *against* Cornewall.

After avoidance by plurality if a stranger presents, the king's prerogative dies with the incumbent.

Owen, 2. 5. 1. And. 148. Moor, 224, 269. 241. Gouldb. 44. 7. Co. 28. a. Cro. Jac. 216. 4. Bac. Abr. 202. 2. Stra. 842. Sav. 89. 1. Leon. 63.

QUARE IMPEDIT. Upon demurrer, the case was, *Simon Kelham* being parson of the rectory of *Somerley*, of the value of ten pounds, took the church of *Rappesly* without any dispensation, and was instituted and inducted, and so continued for twelve years. Afterwards, by reason of this plurality, *Beverley* presented *Berry*, who was instituted and inducted, and so continued for divers years, and died. The queen afterwards presents the defendant *ratione lapsûs* in the time of *Kelham*, who was instituted and inducted. The plaintiff brought the *quare impedit* against the archbishop of *Canterbury*, and *Cornewall*. It was adjudged, that the *quare impedit* did lie; for in this case, *tempus occurrit reginæ* (*a*); and judgment was given, that the defendant should be removed.

(*a*) See 9. Geo. 3. c. 16.

NOTA.

NOTA. Afterwards *Mich.* 30. & 31. *Eliz.* which was entered, *Trinity* 30. *Roll.* 1306. another queſtion aroſe between the ſame parties: *Beverley*, pending the *quare impedit*, was outlawed at the ſuit of *Bawdes:* he being ſo outlawed, and judgment given for him in the *quare impedit*, the defendant *Cornewall* reſigned, and took a new preſentation from the queen, by reaſon of this outlawry in *Beverley*, and he was inſtituted and inducted. Afterward *Beverley* reverſeth the outlawry, and brings *ſcire facias* to have execution of the judgment. *Cornewall* pleads this preſentation, by reaſon of the outlawry, and demands judgment: for the preſentation was veſted in the queen, and executed before the outlawry was reverſed; and by the reverſal it ſhall not be diveſted: but afterward it was adjudged that the plaintiff ſhall have execution; for upon a recovery in a *quare impedit*, any incumbent that cometh in *pendente placito*, ſhall be removed, 7. *Co.* 28.

BEVERLEY *againſt* CORNEWELL. If a patron be outlawed pending a *quare impedit*, the king ſhall preſent though the patron recovers; but on reverſing the outlawry he ſhall have execution of his judgment, and the king's incumbent ſhall be removed. Poſt. 119. 790.

Moor, 270. 1. And. 179. 7. Co. 28. Cro. Jac. 54. 316. 2. Bl. Com. 277. 4. Bac. Abr. 410.

Eaſter

Eaſter Term,

24. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Hugh Wyndham, *Eſq.*
Sir William Periam, *Knt.* } *Juſtices.*
Francis Rhodes, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Dame Killigrew's Caſe.

Quære, Againſt whom the judgment in dower ſhall be given, where the tenant vouches the heir, who enters into warranty. Poſt. 310. Co. Lit. 32.

DOWER. The tenant vouched the heir, and prayed he might be ſummoned in the ſame county, and he was ſummoned and entered into the warranty, and confeſſed the dower.

It was moved, againſt whom the judgment ſhould be. And the Court was in great doubt; for it did not appear that the heir had ſufficient to render dower: for it would be in vain, and a great miſchief to the demandant, if they give judgment for her, when peradventure the heir had nothing, or not ſufficient to render dower; and they commanded precedents in this caſe to be ſearched.

CASE 2.

Anonymous.

Acceptance of ſatisfaction after a bond is forfeited, will not diſcharge the obligation. Poſt. 304. 5. Co. 117. a. 6. Co. 44. Bro. Dett. 174. Cro. Jac. 254. 650.

DEBT upon an obligation to pay forty pounds at *Michaelmas* eve. The defendant pleaded a concord between the plaintiff and him; that if he gave him a hawk, and twenty pounds at *Michaelmas* day, the obligation ſhould be void; and ſaid, that he gave the hawk and twenty pounds at the day; and the plaintiff accepted it.

And this was held no plea; for it appeareth, that for not payment at the day the bond was forfeited, and ſo became ſingle; which cannot be diſcharged by ſuch a naked averment *in fait* of ſuch an acceptance, although the agreement was before the day; but acceptance before the day was a good diſcharge.

CASE 3.

Anonymous.

The ſtatute of uſes immediately conveys the *poſſeſſion* to the *uſe*. 2. El. Com. 332. 336. Dougl. 774.

NOTA. That *ceſtuy que uſe*, at this day, is immediately and actually ſeiſed and in poſſeſſion of the land; ſo as he may have an aſſiſe or treſpaſs before entry againſt any ſtranger who

enters

enters without title; and this by the words of the 27. *Hen.* 8. c. 10. *viz.* "that *ceſtuy que uſe* ſhall ſtand and be ſeiſed," &c. And this was the opinion of divers Juſtices. ANONYMOUS.

Playne's Caſe.

CASE 4.

A LESSEE for years was obliged to pay his rent. In debt upon it, he pleaded, that the leſſor was bound in a ſtatute; and upon that an *extendi facias* was awarded to ſeize the lands and tenements of the leſſor into the queen's hands, which was executed accordingly; and upon that a *liberate* was awarded, and mean between the *extendi facias* returned; and the *liberate* awarded, the rent was incurred; for which he is chargeable to the queen, and demands judgment.

Rent due from a leſſee is not extinguiſhed by the land's being extended by the queen, tho' it accrue between the *extent* and the *liberate*. 2. Roll. Abr. 429. Hob. 82. Co. Lit. 148. 201. 10. Co. 128. Cro. Car. 149. Cowp. 242. 4. Burr. 2443. Wadham v. Marlow, Cook's B. L. 346. cited 1. Term Rep. 91

The opinion of the whole Court was clear to the contrary; for before the *liberate* awarded, *nihil operatur*, for he remains always tenant to the leſſor, and chargeable to him for the rent: and the writ before is but of form, when it ſpeaks of the ſeizing into the queen's hands; for it was never ſeen that lands were ſeized upon that writ.

Trinity

Trinity Term,

28. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clinch, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Cropp *againſt* Hambleton.

Rent tendered off the premiſes by a third perſon, at any time before the condition is broken, ſaves the re-entry.
Ante 15.
Godb. 38.
Moor, 223.
5. Bac. Ab. 3.

TRESPASS. Upon ſpecial verdict, the caſe was, *Cropp* let to the defendant land for years, rendering rent at *Michaelmas*, with a re-entry for default of payment at *Michaelmas*, or twenty days after. The leſſee for two years uſed to pay the rent to *Mary Briggs*, ſervant of the leſſor, and he accepted it at her hands; and in the third year he paid the rent to the leſſor, and in the fourth year paid it within the twenty days to the ſaid *Mary Briggs*, and prayed her to pay it to the leſſor; who within the twenty days tendered it to *Cropp*, who refuſed to receive it, and blamed her for taking it; and at the laſt day of the twenty days *Cropp* demanded the rent, and it was not paid: and thereupon he entered.

The queſtion was, If his entry were lawful? And after argument, it was adjudged for the defendant, for the condition was not broken.

Plowd. 70. a. b.
10. Co. 129. a.
See Hargrave's note [3] on Co. Lit. 202. a.
Cowp. 243.
Dougl. 52.
2. Term Rep. 425.

THE COURT held, that the tender of the rent to the leſſor himſelf at any day within the twenty days, although it be out of the land, is good, and he ought to receive it: and when he paid it to *Mary Briggs*, and ſhe tendered it to the leſſor, this ſhe did as ſervant to the leſſee for that time, and is as good as if the leſſee had tendered it. *Ex relatione* COVENTRY.

CASE 2.

Burdet's Caſe.

If the ſteward of a manor make a deputy to take a ſurrender in fee, and he takes a *conditional* ſurrender, yet it is good.
Moor, 112.
1. Leon. 289.
Com. Rep. 84.

THE caſe was, The dean and chapter of *Ely* were ſeiſed of a manor, in which the cuſtom was, that the copyholders may ſurrender out of court to the uſe of a ſtranger in fee: they make *J. S.* their ſteward *ad exequendum per ſe vel ſufficientem deputatum ſuum*. *J. S.* maketh *A.* his deputy *hâc vice*, to take a ſurrender of *baron* and *feme* to the uſe of the *baron* and *feme* for their lives, remainder over in fee; and the words were further in the deputation, "*et ulterius ad faciendum et exequendum quantum in me eſt.*"

The

The ſaid *A.* by force of that deputation, takes a ſurrender from the *baron* and *feme*, upon condition, that the lord ſhall grant it to them for their lives, remainder over in fee. The ſurrender was executed accordingly; the *baron* and *feme* die; he in the remainder enters; the heir of the *feme* ouſts him; and he brings treſpaſs.

Firſt, It was agreed, that this deputation *hâc vice* was good.

Secondly, That although the authority to take the ſurrender was abſolute, and *A.* took the ſurrender upon condition, yet it was good, by reaſon of thoſe words, *et ulterius ad faciendum, &c.*

BURDET'S CASE.

12. Mo'. 468. 1. Bac. Ab. 47). Gilb. Ten. 314. Cowp. 26.

Anonymous.

CASE 3.

ERROR. The error aſſigned was, that the defendant, in the original action of debt, was named "*nuper de London*," and in the exigent, "*de London.*" And all THE COURT held it to be an error, for the original was the foundation of the ſuit, and *the exigent* is to purſue it without variance, and the word "*nuper*" being omitted out of *the exigent*, it is erroneous (*a*).

Variance.

Poſt. 50.

(*a*) By 5. Geo. 1. c. 13. all writs of error wherein there ſhall be any variance from the original record, or other defect, ſhall be amended, and made agreeable to ſuch record, by the reſpective courts where ſuch writs are returnable.—But this ſhall not extend to writs of error, or criminal proceedings.—See Dougl. 114.

Sir Thomas Cockaine and his Wife *againſt* Witnam.

CASE 4.

ACTION FOR WORDS. At the *niſi prius* the defendant pleaded, *concord puis le darraine continuance, judgment ſi al enqueſt, &c.* And by all the Juſtices it was no plea, but he ought to conclude, *judgment ſi actio, &c.* and ſo in all pleas pleaded ſince the laſt continuance.

CONCORD to an action for words pleaded *puis darraine continuance* muſt conclude to the *action* and not to the *country*; and, if not true, confeſſes the matter in iſſue. Poſt. 747.

THEN it was moved, if judgment ſhall be given upon this, or a new *niſi prius* be granted; and upon good advice judgment was given for the plaintiff, for it was a confeſſion of the matter in iſſue.

THE words were, "My *Lady Cockaine* did offer two ſhillings to "a woman with child, to get her a drink to kill her child, be"cauſe it was gotten by *J. S. Sir Thomas Cockaine*'s butler." And it was moved the action did not lie for theſe words; but it was adjudged for the plaintiff, for by them the lady's credit is impaired; and if true, there was cauſe to bind her to her good behaviour, although it was not ſaid ſhe did give money, or any hurt was done, but that ſhe offered, &c. This caſe was adjudged *Hill.* 19. *Eliz. Intratur, Mich.* 17. *et* 18. *Eliz. Rot.* 183. *Ex relatione* CHAMBERLAINE. *Vide* 4. *Co.* 16. *b.*

Words actionable. Dyer, 361. Yelv. 181. 3. Lev. 120. Freeman, 252. 112. 2. Mod. 307. Allen, 66. Bull. N. P. 309. Gilb. C. P. 84. Lutw. 1143. 2. Wilſ. 137. 3. Bl. Com. 317.

Michaelmas Term,

28. and 29. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Criſpe *againſt* Golding.

With what certainty the conſideration in *aſſumpſit* muſt be alledged.

ASSUMPSIT. Upon iſſue joined that *non aſſumpſit*, it was found for the plaintiff.

WALMSLEY, *ſerjeant*, moved in arreſt of judgment, that the conſideration upon which the action was brought, was not well alledged; for the plaintiff declared that *J. S.* was ſeiſed in fee, and made a leaſe to him for years, 24. *Eliz.* by virtue whereof he entered and was poſſeſſed; and being ſo poſſeſſed, the defendant, upon communication between him and the plaintiff, aſſumed, that if the plaintiff would ſeal and deliver to him a deed of aſſignment of his leaſe and intereſt in the land, that he would pay to him a hundred pounds, and alledged that he did ſeal and deliver a deed of grant, &c. but doth not ſay he was then poſſeſſed; and if he were not, the grant was void; and ſo no conſideration.

Ray. 9. 400. Yelv. 17. 5. Com. Dig. 51. Dougl. 727.

Secondly, he doth not alledge, that he did grant his leaſe and intereſt, but that he ſealed and delivered a deed of grant, which is not a grant.

CURIA, *contra*; for when it was alledged that the plaintiff was once in poſſeſſion, it ſhall be intended he did ſo continue till the grant, and it ſhall be intended a good grant, and the leaſe and intereſt paſſed by it: and it was ſo adjudged.

CASE 2.

Lancelot *againſt* Johns.

An outlawry in debt reverſed for ſeveral errors.

ERROR, upon a recovery in debt, and outlawry upon it.

Co. Lit. 288. b. Ante 49. Poſt. 104. 116. 240. 592.

Firſt Error. The defendant brought debt againſt *Lancelot* and *J. S.* and the ſheriff returned, *quòd non habent bona aut catalla quod ſummoniri poſſint*; whereas it ought to be, *per quod ſummoniri, &c.*

Second Error. It ought to be, *neque eorum aliquis habet.*

Third Error. It is returned, *quinto exacti fuere per quod utlagati exiſtunt*; whereas it ought to be, *per judicium coronatorum utlagati*, for they are judges, and the certificate is to be by them.

Fourth

Fourth Error. In the original he was named *Launcelot*, and in the exigent *Lancelet*. LANCELOT *against* JOHNS.

Fifth Error. He was outlawed in *Huſtingis*, and doth not ſay *in Huſtingis de communibus placitis*. 1. Com. Dig. 46.

And for theſe errors the judgment was reverſed. *Vide* 2. *Rich.* 3. *pl.* 13. 14. *Edw.* 4. *pl.* 6. 5. Com. Dig. 241.

Allen *againſt* Yorke. CASE 3.

THE caſe was, *Allen* was condemned at the ſuit of *Yorke* in the queen's bench in an action upon the caſe, and damages were aſſeſſed to 4000l. *Yorke* dieth, being ſatisfied of 1000l. parcel of the 4000l. and his wife being executrix, brings a *ſcire facias* for the 3000l. reſidue.—THE COURT doubted. *Vide* 4. & 5. *Mar. Dyer*, 165. 19. *Rich.* 2. "*Execution.*" *Quære*, If an executrix ſhall recover by *ſcire facias* the reſidue of a judgment debt due to the teſtator. 1. Com. Dig. 241.

1. Wilſ. 302. Carth. 69. Strange, 1198. See 17. Car. 2. c. 8.

Anonymous. CASE 4.

ERROR, upon a judgment given in a *formedon*. The error aſſigned was, that the action was brought againſt three, whereof one was within age, and judgment was given by default; whereas judgment is not to be given againſt an infant by default; and upon this it was demurred in law. *Quære*, If judgment in *formedon* ſhall be given againſt an infant by default. Poſt. 309. Cro. Jac. 465.

The infant was brought into court to be ſeen, and he was of the age of ſeven years.

THE COURT doubted after argument by ANDREWS, and would adviſe. *Vide Dyer*, 104.

Hillary Term,

29. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Morgan *againſt* Kiffe.

"He maintained pirates." *Quære*, If it muſt not be averred that he knew them to be pirates? Poſt. 251. 487. 746. Cro. Jac. 59.

ACTION FOR WORDS, that the plaintiff "maintained, victualled, and helped to let go certain pirates, contrary to the law of the realm, and the proclamations made." Upon not guilty pleaded it was found for the plaintiff, with damages ſixty pounds.

It was moved in arreſt of judgment, that the words were not actionable; for it is not alledged that he knew them to be pirates, or maintained them in their piracy.

COKE, *contra*; for when it was alledged "he maintained pirates," &c. it ſhall be intended *in malam partem*, and that he ſpoke them maliciouſly, and that he maintained them, knowing them to be pirates. And it was adjudged in *Sir Henry Lea*'s caſe againſt *Penniſton*, where *Penniſton* ſaid to *Sir Henry*, "he maintained thieves," that an action did lie; and afterwards the plaintiff had judgment: for when it is ſaid "he maintained them againſt the law and proclamations," it ſhall be intended in the worſe ſenſe. And although piracy is triable by the civil law, yet by the 28. *Hen.* 8. c. 15. our law taketh notice of it.

CASE 2.

Pettywood *againſt* Cook.

Eaſter Term, 28. *Eliz. Roll* 374.

A. deviſes three houſes to his wife, *for life*, with remainder of one houſe to each of his three children *in fee*; "and if any of them die without iſſue, the ſurvivors ſhall enjoy *totam illam partem* equally between them."

EJECTIONE FIRMÆ. The caſe was, *Hawkins* was ſeiſed in fee of three houſes in *Bury*, and deviſed them to *his wife* for life; the remainder of one of the meſſuages to *Robert* his ſon, and his heirs; the remainder of one other of the meſſuages to *Chriſtian* his daughter, and her heirs; and of the third meſſuage to *Joan* his daughter, and her heirs; having only theſe three children. And did further will, that if any of them died without iſſue, that then the ſurvivors ſhall enjoy *totam illam partem* equally divided between them. *Chriſtian* taketh huſband, and hath iſſue the leſſor of the plaintiff, and dieth; after, *Robert* dieth without

—Theſe words convey to the ſurvivors an eſtate *for life* only. Poſt. 695. 743.

out iſſue; then *the feme* of the teſtator dieth. *Joan*, being the ſurvivor, enters into all the part of *Robert*, and taketh huſband, and hath iſſue the defendant, and dieth. PETTYWOOD *againſt* COOKE.

The queſtion was, If the iſſue of *Joan* ſhall have all the part of *Robert*, as a deviſe to his mother and her heirs; or if the iſſue of *Chriſtian* ſhall have a moiety with her as co-partner? 2. Leon. 129. 193. 3. Leon. 180. Shower, 207.

The caſe was argued by GOLDING *for the plaintiff*, and COKE *for the defendant*; and all the Juſtices held, that by the deviſe only an eſtate for life is limited to the ſurvivor, and the fee doth deſcend by courſe of law, as well to the iſſue of *Chriſtian*, which firſt died, as to the ſurvivor; and though the words are, "that the "ſurvivor ſhall enjoy *totam illam partem*," that is, all the meſſuage, and not according to all the eſtate the party dying had in the meſſuage; for no eſtate being limited, it ſhall be intended but an eſtate for life. And the plaintiff had judgment. 2. Mod. 253. 261. 383. 1. Roll. Abr. 836. Eq. Ca. Abr. 185. Stra. 805. 849. Ld. Raym. 1561. 2. Vern. 388. 3. Com. Dig. 31. 2. Bac. Ab. 58. 3. Burr. 1896. Cowp. 257. Dougl. 417. 759. 1. Term Rep. 596.

The Sheriffs of Norwich *againſt* Bradſhaw. CASE 3.

ACTION upon the caſe for an eſcape. The plaintiffs declared, that whereas *J. S.* recovered againſt the defendant in debt nine pounds and ten ſhillings, and a *capias* was awarded to take him in execution, by force whereof they made their warrant to the three ſerjeants, &c. there to arreſt him, who did arreſt him 25. *Feb.* and he eſcaped from them, and afterwards was not found in the ſaid county, *per quod* they were bound by reaſon of the eſcape to anſwer the debt, *necnon* to expend money for the ſearch of him, to their damages twenty pounds. Upon not guilty, the jury found he was arreſted *circa* the 26. of *Feb.* and then and there *ſeipſum reſcuſſit*. And it was alledged in arreſt of judgment, that the declaration was not good, for two cauſes. 1. That they alledge that they made a certain warrant, and ſay not *ſub ſigillo ſigillat'*, and a warrant without ſeal is not ſufficient. 2. They alledge that they were chargeable with the debt, but ſay not they were charged, nor ſhew not that they were otherwiſe damnified: and if they be not damnified they have no cauſe of action, for it may be the party will never ſue them, or they may die before ſuit, and then the ſuit is gone: and an exception was taken to the verdict; for the arreſt and reſcue is ſuppoſed to be 26. *Feb.* and the jury find it was *circa* 26. *Feb.* which is uncertain whether it were before or after that day; and if it were after the day, it will not maintain the declaration, for then it cannot be a reſcue the 26th day; but if it were before the day, then it continueth a reſcue at that day.

The ſheriff may bring an action for an eſcape againſt a priſoner before he has paid the money, and need not alledge in his declaration that the warrant was under ſeal, nor the preciſe day when the eſcape was made, ſo as it be before *his* ſuit was commenced. Poſt. 237. 1. Strange, 434. 1. Lev. 237. Lut. 64. Godb. 125. Shower, 174. 3. Co. 52 1. Sid. 330. Moor, 660. 404. 597. 1. Leon. 237. 1. Mod. 660. 3. Wilſ. 269.

CURIA, *contra in omnibus*. As to the firſt, it is uſual form, when the ſheriff's warrant is pleaded to arreſt one, to ſay that they made a warrant, &c. but do not ſay *ſub ſigillo*, &c. Secondly, An action lieth by the ſheriffs upon this eſcape before the party ſue them, for the party arreſted did wrong to them by the eſcape and reſcous, and they are always chargeable to the other party; and if they ſtay till they are ſued, perhaps the party that eſcaped may die in the interim, or will fly the country, that they cannot hear of him; and in *Holt v. Hills* in this court, it hath been adjudged that an action lieth for this eſcape, and the party ſhall not take Poſt. 124. 237. 264. 293. 349. 5. Co. 24. a.

SHERIFFS OF NORWICH *against* BRADSHAW.

advantage of his own *tort*. And as to the exception to the verdict, it is good enough, be the reſcous before the day or after the day ſuppoſed in the declaration, ſo as it be before the ſuit commenced.—And ſo CLENCH ſaid it hath been adjudged upon great advice, where a treſpaſs was found to be done after the day alledged, for the day is not material. And the plaintiff had judgment.

8. Co. 52. b. F. N. Br. 139. b.

CASE 4.

Alford *againſt* Lee.

Hillary Term, 29. Eliz. Roll 556.

A releaſe delivered to a ſtranger is a good performance of an award, if no particular place be mentioned for the delivery. Poſt 143. 627. 5. Co. 119. b. Moor, 3. 2. Leon. 110. Barnes, 54.

DEBT upon an obligation. The caſe upon demurrer was, The plaintiff and defendant ſubmitted themſelves to the award of certain perſons, of all matters, &c. and were obliged each to the other to ſtand to the award. They made an award, that they ſhould releaſe each to the other all actions before the feaſt of *St. Peter* then next enſuing. The defendant in the eve of the ſaid feaſt makes a releaſe to the plaintiff, and delivers it to one *Primme* to the uſe of the plaintiff, without his aſſent or knowledge, and when the plaintiff heard of it, he diſagreed to it; and if this were a performance of the award was the queſtion.

COOPER argued it was not, for it taketh no effect as a releaſe till the agreement of the party: and it is delivered to a ſtranger, who will peradventure not deliver it without ſuit, and perhaps will never deliver it; and relied upon 20. *Edw.* 3. "*Account*," 70.

ATKINSON *contra*; for it is immediately a releaſe, and he cannot plead againſt it, *non eſt factum*; nor can countermand it, and the plaintiff may agree to it when he pleaſeth; and cited *Taw's caſe*, 2. *Eliz. Dyer*.

Afterwards, in *Trinity Term*, 29. *Eliz.* it was adjudged a good performance of the condition, becauſe no place was appointed by the arbitrators where the releaſe ſhould be delivered; and it may be the plaintiff will abſent himſelf out of the county, that the defendant cannot find him; and they relied upon *Taw's caſe*.

Eaſter

Eaſter Term,

29. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Gray *againſt* Jefferies.

CASE 1.

TRESPASS upon the caſe. And ſuppoſeth that he in 24 *Eliz.* put *Th. Gray* his ſon and heir apparent to the defendant, to be his apprentice in the art of a taylor for ſeven years; and that the plaintiff was ſeiſed of lands in the county of *B.* in fee of the value of twenty pounds, which lands after his deceaſe are to deſcend to the ſaid *Th. Gray:* the defendant the firſt of *May* 28. *Eliz. vi & armis* did aſſault the ſaid *Th.* and ſtruck him with a ſpade upon his back, by which he became lame and decrepit, by reaſon whereof he loſt his marriage, and could not marry him as before, to his damages two hundred pounds (*a*).

The father of an heir cannot have an action of treſpaſs for loſs of marriage of his ſon, by reaſon of a maim received from the maſter to whom he was apprentice.—Poſt. 770. 2. Inſt. 90. 3. Co. 38. b. Moor, 736. Raym. 259. 3. Bl. Com. 140. 3. Burr. 1879. 2. Term Rep. 4. 166.

Upon this declaration the defendant did demur in law; and it was argued by *Tanfield* of the one part, and *Helton* of the other: and the ſame day without any further argument it was adjudged for the defendant; for the Juſtices ſaid, it doth not appear by any book that the father ſhould have an action for the loſs of the marriage of his ſon and heir, except when a ſtranger takes him by force and marrieth him: but if the ſon marry himſelf, or a ſtranger procureth him to marry one, the father hath no remedy: and treſpaſs for beating or battery of the ſon lieth not for the father, but the ſon only ſhall have the action. Alſo in this caſe he is bound apprentice for ſeven years; and ſo till the ſeven years are paſt, the father hath nothing to do with him, and cannot marry him during that time; and ſo cannot have an action for loſs of his marriage, which perhaps will never come to him.

(*a*) See 12. Car. 2. 24. by which the *valor maritagii* is aboliſhed.

Anonymous.

CASE 2.

NOTA. It was held by WRAY and CLENCH, that if one cut trees which are or may be timber-trees, as oaks, elms, &c. although they be under the age of twenty years, no tithes are due; and ſo if trees of that age be cut, and new germins grow, no tithe is due, though they be cut under that age.

No tythe due for timber trees. Ante 1. 11. Co. 48. b.

Case 3.

Love *against* Pigott.

A reversioner shall have prohibition. Moor, 915. 3. Lev. 209.

IT was said there are divers precedents, that if a lessee for years be sued in *Court-Christian* for tythes, he in the reversion may have a prohibition.

Case 4.

Trevilian *against* Lane.

A lease for three lives made by tenant for life & remainder man in tail, is no discontinuance. Post. 252.

EJECTIONE FIRMÆ. The case was, *Avice Trevilian*, tenant for life, remainder in tail to *Thomas* her son, remainder in fee to the heirs of *Avice*. *Avice* and *Thomas* make a lease for three lives by indenture; *Avice* dieth; *Thomas* grants the reversion to *B.* in fee to the use of his last will; and afterwards deviseth the reversion for years and dieth. The three lessees for life die. The devisee for years enters; the heir of the body of *Thomas* ousts him; and he brings *ejectione firmæ*.

1. Co. 77. a. acc.

The question was, If the lease for three lives be a discontinuance to toll the entry of the issue?

Cowp. 702.

Drew argued that the entry of the issue was lawful; for the lease for three lives being made by deed, was the lease of the tenant for life, and the confirmation of *Thomas*, and so no discontinuance, 13. *Hen.* 7. 14. *Comment.* 140. 13. *Edw.* 4. 4. But if it had been without deed, then it had been the surrender of the tenant for life, and the lease of him in the remainder, for otherwise nothing would pass from him.

Coke contra, that it was a discontinuance; for a lease for three lives was more than they both could make; and so it is a *tort*, and the reversion was gained by *tort*, but in whom the reversion was, it may be doubted.

But it was adjudged that it was no discontinuance. *Ex relatione* JOHANNIS WALTER.

Case 5.

East Skidmore and Foame *against* Vaudstevan.

A misnomer of the christian name of one of the plaintiffs in the defendant's plea of a *release* to an action of covenant, is fatal.

COVENANT. For not performing certain covenants in an indenture between the plaintiffs, master of the good ship of *A.* of which *Robert Pitman* was owner of the one part, and the defendant of the other part; and the conclusion of the indenture was, "*In cujus rei testimonium*, the parties aforesaid to these presents have set their hands and seals." And all the plaintiffs and the said *Robert Pitman* set their seals to one part, and the defendant to the other part; and in the indenture there were divers covenants to be performed by the plaintiffs and by the said *Robert Pitman* to the defendant; and *è converso*: and there was a clause in the indenture, that the plaintiffs and the said *Robert Pitman* bound themselves to the defendant to perform the covenant. The defendant pleads, that the indenture was delivered to the plaintiffs, and to the said *Thomas Pitman* (and so mistakes *Thomas* for *Robert*); pleads the release of the said *Thomas* of all covenants; and thereupon the plaintiffs demurred, for two causes: 1. The release was pleaded by *Thomas Pitman*, whereas no such man was named in the indenture. And this was held a great mistake, and without defence; and the roll was commanded to be searched.

Ld. Raym. 28.

The

The chief matter was, admitting the name had been right pleaded, and that *Robert Pitman* had releaſed, if this releaſe was good. COKE argued, that foraſmuch that only the plaintiffs in the premiſes of the indenture were parties of the one part, and the defendant of the other, although *Robert Pitman* is afterwards named in the deed, it is a void deed as to him; and no covenant made to him or by him is good, for he is a ſtranger to it, and his ſealing and delivery is not material: as if *I. S.* by indenture between him of the one part, and *I. D.* of the other, demiſeth lands to *I. D.* and *A. B.* it is void to *A. B.* And he anſwered the caſes put by GODFREY of the other ſide, 4. *Edw.* 2. *Obligation*, where an obligation was made by *I. S.* & *ad majorem rei ſecuritatem inveni J. D. Fide-Juſſorem*, and *I. D.* put his ſeal to it; this was his deed: which caſe he agreed; for it is not mentioned whoſe deed it is; and ſo is the deed of both which are named, and put their ſeals, &c. So when an incumbent grants a rent, by the aſſent of patron and ordinary, and they put their ſeals to it, this is not their deed, but only their agreement to it; and the caſe of 39. *Edw.* 3. *pl.* 9. is upon the ſame reaſon of 4. *Edw.* 2.—In *Mich.* 29. & 30. *Eliz.* it was adjudged for the plaintiffs, and the principal cauſe was the *miſnoſmer*, which the Court held could not be amended. WRAY ſaid, they conceived the matter in law to be alſo for the plaintiffs.

EAST SKIDMORE, &c. *againſt* VAUDSTEVAN.

A perſon whoſe name is not mentioned in the *premiſes* of a deed, is not a party to it. Poſt. 58. 115. 2. Inſt. 673. 2. Rol. 22. Cowp. 600.

Sir Walter Aſton *againſt* Whitenall.

CASE 6.

WASTE. Error was brought of a judgment, in an action of waſte, and the error aſſigned, that the plaintiff in the action did count, *quòd cum fuiſſet ſeiſitus* of the land, he did demiſe the ſame to the defendant for years, and he had done waſte. The defendant pleaded "*nul waſte fait*," and found againſt him, and judgment given. The error aſſigned was, that he ſaith "*quòd* "*ſeiſitus, &c.*" but ſaid not of what eſtate; and ſo may be intended but an eſtate for life.

Qu. If in waſte by leſſor againſt leſſee, it is neceſſary for the plaintiff expreſsly to plead the eſtate of which he is ſeiſed. Ante, 22.

GODFREY and BEAUMONT ſaid, that the declaration ought to comprehend certainty, and ſhall not be good by intendment: and although the declaration had been good, if he had not mentioned any ſeiſin; yet when he alledges ſeiſin, and that inſufficiently, the declaration is not good; as *Partridge's Caſe* in *Plowden* reciting a ſtatute, &c. (*a*).

Poſt. 65. 87. 9. Co. 27. a.

But SCHUTE and CLENCH, *Juſtices*, held the declaration to be good; for the allegation of ſeiſin is not material, when it might have been left out; and it is helped by the words ſubſequent, *viz.* "*ad exhæreditationem*," which explain how he was ſeiſed; and it being but matter of form, it is helped by the ſtatute of *jeofails* after verdict.—GAWDY doubted; *et adjournatur*.

(*a*) Plunkett *v.* Griffith Poſt. 236. Dougl. 642. 1. Term Rep. 236.

Diſply *againſt* Sprat.

CASE 7.

EJECTIONE FIRMÆ. They were at iſſue, and in the *venire facias* one of the pannel was named *Thomas Barker* of *D.* and in the *diſtringas jurat'* he was left out, and *Thomas Carter de D.* put in his place. At the *niſi prius Thomas Carter* was ſworn, and, with others, tried the iſſue.—COKE alledged this in arreſt of judg-

A man can have but one name of baptiſm; but he may have two ſirnames.

DISPLY *against* SPRAT.

Post. 319. 222. 258. 328. 866. Cro. Jac. 558. 5. Co. 42, 43. Co. Lit. 3. a. 3. Bac. Abr. 276. 622.

judgment; for now there were but eleven of the pannel, *Thomas Carter* being mistaken, and falsly named for *Thomas Baker*; as in a *venire facias*, a juror was returned by the name of *George Tompson*, and in the *distringas jurat'* he was named *Gregory Tompson*, and sworn at the *nisi prius*; and this was held a void verdict.—But THE COURT said, there is a great difference between a mistake in the name of baptism, and in the sirname; for a man can have but one name of baptism, but may have two sirnames.

CASE 8.

Windsmore *against* Hubbard.

Trinity Term, 27. Eliz. Roll 850.

A lease to one for life *habendum* to his three sons successively, but omitting to mention them in the premises of the deed, shall be for the life of the father only, and the sons shall not take in possession nor by way of remainder; nor can there be an *occupant* to such an estate.

Ante 56. Post. 89. 121. 491. Owen, 138. Goldb. 51. Co. Lit. 6. 9. Co. 47. 2. Roll. Abr. 65. Hob. 275 313. Hutt. 87. Cart. 5. Cro. Jac. 564. 13. Co. 54. Poph. 126. 1. Wood Con. 17. 1. Salk. 188.

EJECTIONE FIRMÆ. The case was, *Lord Sturton* by indenture between him and *J. S.* let certain land to *J. S.* for life, *habendum* to him and *A. B.* and *C.* his three sons *successivè*. The first question was, If they all took an estate, because the sons were not named in the premises of the deed? Secondly, the question was, If they take, whether they take jointly, or not? And thirdly, If they take no way, whether there shall be an occupant for the life of the three others, so as it shall be a lease to *J. S.* for his own life, and for the life of the three sons? And after argument by *Coke* and others, the clear opinion of the Court was, That the sons shall not take in possession, because they are *not named* in the premises of the deed, nor shall they take by way of remainder; for the intent was, to give the land to them in possession, 18. *Edw.* 3. *pl.* 59. *Broke* "*Leases*" 54. The only doubt was, if there shall be an occupant?—But WRAY, C. J. said, there can be no occupant; for it being limited to the father for his life, this is a greater estate than for the lives of others (*vide* 5. *Co. Rosse's Case*) and the three sons are named as persons to have an estate, and not to make a limitation of an estate. And *Trin.* 29. it was adjudged, that there was no remainder, and that there shall be no occupant (*a*). *Ex relatione* WALTER.

NOTA. *Delaper's Case*, 17. *Eliz.* (*b*). Tenant by the courtesy grants over his estate; the grantee deviseth it, and dieth: this was held a void devise, and out of the statute of wills: and it was held, that although the devisee doth first enter after the death of the devisor; yet he shall not have the land as an occupant, for there shall be no occupant of an estate of tenant by courtesy, or tenant in dower, which are estates created by law. *Ex relatione* EDWARD COKE.

(*a*) By 29. Car. 2. c. 3. where there is no special occupant in whom the estate may vest, the tenant *pur autre vie* may devise it by will, or it shall go to the executors, and be assets in their hands for payment of debts.—And by 14. Geo. 2. c. 20. it shall vest not only in the executors, but in case the tenant dies intestate, in the administrators also, and go in a course of distribution like a chattel interest.—See 2. Bl. Com. 259, 260.

(*b*) Vide Harg. Co. Lit. 41. b. note [1] where this subject is explained. See also Powell on Devises, p. 37.

Trinity

29. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Marſh *againſt* Kavenford.

CASE 1.

ASSUMPSIT. And counts, that whereas, at the requeſt of the defendant, there was a communication of a marriage between the plaintiff and the daughter of the defendant; that he married her, and that *afterwards* the defendant promiſed to pay him one hundred pounds.—EGERTON and FOSTER argued, that this was no conſideration; for it is paſt, and had no reference to any act before: but if the marriage had been at the requeſt of the defendant, and after the marriage he promiſed, &c. this had been good.—POPHAM, DANIEL, and COKE *contra*. For the father's natural affection doth continue, and her advancement is ſufficient cauſe of the promiſe. And they ſaid, it was adjudged in the exchequer, that a promiſe of ten pounds in conſideration of counſel given to one, this was good, though the counſel was given before: and it was here adjudged for the plaintiff.

Promiſe by a father to his ſon-in-law *after the marriage* raiſes a conſideration.
Ante, 42.
Poſt. 715.
Cro. Car. 409.
1. Roll. Ab. 12.
Hob. 105.
Dyer, 272.
3. Lev. 366.
2. Leon. 211.
Cowper, 294.

Rainſcroft *againſt* Lawney.

CASE 2.

Eaſter Term, 27. Eliz. Roll 167.

ERROR of a judgment in the common bench. For that the record was, that the defendant *obtulit ſe per* CUTTING, *attornatum ſuum*, and left out his chriſtian name: and the judgment was reverſed.

Judgment reverſed for want of the attorney's *chriſtian* name.
Poſt. 75. 84. 145. 153. 177. 328. Sed vide Dougl. 114, 115.

Cottington *againſt* Hulett.

CASE 3.

Eaſter Term, 29. Eliz. Roll 186.

ASSUMPSIT againſt an executor upon the promiſe of the teſtator; and in the declaration it was not averred that he had aſſets to pay debts, &c. But *Mich.* 29. & 30. *Eliz.* it was adjudged, that the declaration was good; and the plaintiff recovered.

An *aſſumpſit* againſt an executor need not aver that he has aſſets.
9, Co. 90. b. Cro. Jac. 294. 1. Rol. Ab. 921. Cowp. 290. 293. 1. Term Rep. 235.

Aſh *againſt* Wood.

CASE 4.

ERROR. The plaintiff counts in replevin *quod adhuc detinet*, and the jury aſſeſſed the value of the beaſts and damages entirely; whereas they ought to ſever them: for he may have the one, and not the other; and the judgment for this cauſe was reverſed.

In replevin for *taking* and *detaining*, damages muſt be ſeveral.
Poſt. 560.
See 2. Bac. Abr. 8. Cro. Jac. 251.

Giles *againſt* Ferrers.

CASE 5.

THE Aſſiſe of Nuſance. The plaintiff counts that *exaltavit domum*, the Jury find that *erexit*, and exception taken to it; but the Court was informed by the grammarians, that the words were of one ſenſe.

Synonimous words.
Poſt. 176.
Cowp. 229.
725. 717. Dougl 434.

Michaelmas Term,

29. and 30. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Peeke *againſt* Wyrrall.

Pleading in replevin.

REPLEVIN. The defendant made cognizance as bailiff of *Tho. Pigott, Eſq.* for damage-feſant.—The plaintiff replied, that *Sir John Goodwin* was ſeiſed, &c. and that he and all his anceſtors had uſed to have for him, and all his tenants for years and at will, &c. common in the place WHERE, for all their horſes and colts; and he *put in* the horſes, &c.—The defendant rejoined, that in the place WHERE, it was uſed time out of mind, &c. that if the horſes of *Sir John*, or of his anceſtors, &c. did come there *by eſcape*, and were *not put in*, that it ſhould not be lawful for the ſaid *Tho. Pigott, &c.* to diſtrain them damage-feſant, but to put them out peaceably; and ſaid, that the place, &c. was incloſed, and that the plaintiff broke down the incloſure, and *put in* his cattle, for which he diſtrained, &c. ABSQUE HOC, that *Sir John Goodwin, &c.* had common in the place where, *aliter, &c.*—WALMSLEY moved this was no good traverſe; for he did not confeſs that *Sir John Goodwin* had any common, and therefore he ought to traverſe ABSQUE HOC, that *Sir John* had any common there.—CURIA. That pleading had been better; for in truth he hath not confeſſed any common, &c. but it ſeemeth good enough as it is; for this liberty that his cattle ſhall be there without being diſtrained, is in nature of common; and therefore he might plead as he did: but they ruled, that the defendant ſhould mend his plea, or that a demurrer be joined.

CASE 2.

Knight *againſt* Mory.

A proviſo that a leſſee ſhall not alien his term without the leſſor's conſent, is *a condition precedent*; and deviſing it is a breach.

REPLEVIN. The caſe was, *Shelley* makes a leaſe for years, *proviſo quòd non licebit*, to the leſſee, to alien his term without the aſſent of the leſſor. The leſſee deviſeth the term to his ſon; the leſſor aſſenting to it. — Three points reſolved. 1. This is a condition. 2. A deviſe in general is a breach of the condition.—3. As this caſe is it is no breach; for nothing paſſed till the leſſor's aſſent was obtained; for it was a condition precedent: and though in the principal caſe the deviſee did enter by the conſent of the executor, and had not licence of the leſſor, yet it is not material.

Poſt. 330, 331. 1. Roll. Abr. 428. Cro. Jac. 74. Dougl. 689. 3. Leon. 67. 4. Leon. 5. Gouldſ. 59. Dyer, 45. 4. Co. 119. Cowp. 803. 2. Term Rep. 425.

Anonymous

Anonymous.

Case 3.

NOTA. Coke moved this case to the Justices, to know their opinion, he being (as he told me) to make his award in it.— Tenant in fee-simple soweth the land, and before the corn was severed, deviseth the land to *A.* for life, remainder to *B.* for life, and dieth. *A.* dieth before the emblements were severed; the question was, Whether the executor of the tenant for life, or he in the remainder, should have the emblements? for he said clearly, that the executor of the devisor had no colour to have them.

The remainder man for life shall have the emblements sown by the devisor in fee, in preference to the executor of the tenant for life.

Wray, C. J. and Schute held, that he in the remainder should have them, for by the devise of the land they pass with it; and when they pass by reason of the land, and come not by the manurance of the first tenant for life, they shall go with the land: but if the first tenant for life here granted them to another, it had been otherwise; for by the grant they are *quasi* chattels severed from the land.—And Wray, C. J. said, it hath been adjudged in this court, that where *baron* and *feme* are joyntentants of land, and the *baron* soweth the land, and dieth before severance of the *corn*, the *feme* shall have it.

Post. 464. 1. Roll. Ab. 727. Winch. 51. Hob. 132. 8. Ass. 21. Dyer, 316. Noy, 149. 2. Vern. 322. Harg. C. L. 55. b. Note (2.)

Clench doubted in the principal case; for he conceived that the executor of the first tenant for life shall have them, as chattels vested in him: and he said, if land be sown, and then the land is devised to *J. S.* for life only, and before severance the devisee dieth, his executor shall have the corn, and not the reversioner: which case Wray and Schute denied; but said if it were so, it is not like the case a remainder.

1. Com. Dig. 599. Dougl. 283. 2. El. Com. 122.

Popham, *Attorney General*, being demanded his opinion, agreed with Wray in the principal case, but doubted of the case of *baron* and *feme*.

Frat and Uxor *against* Taylor.

Case 4.

ASSUMPSIT. That whereas the wife of the plaintiff, in consideration that the defendant should marry her daughter, had given to him ten pounds, he promised to the wife, that if he did not marry her daughter, he would repay the ten pounds; and avers he did not marry her, &c. Upon *non assumpsit* pleaded, and found for the plaintiffs, it was alledged in arrest of judgment, that the delivery of the money by the *feme* was void, and then the promise made to her is also void. And although the *baron* agreeth afterward to the delivery and promise (as it appeareth by his bringing the action), yet this cannot make the promise, which was void, to be good; for there was no consideration at the time of the promise. Another matter was moved, that the *baron* and *feme* did join in the action, where it ought to be brought by the *baron* only; for it is void to the *feme*, being during *coverture*, and it is as a promise made to the *baron* only. But it was adjudged, that the action was well brought; for the agreement of the *baron* maketh the promise good *ab initio* to the husband; and it being made to the wife, they may join in the action.

A promise made to a wife is good *ab initio*, if the husband agree to it; and his bringing the action, (in which she may join) is evidence of his agreement. Cro Jac. 77. 205. 2. Sid. 128. Stiles, 9. Carth. 251. 4. Mod. 156. Salk. 114. Stra. 231.

Anonymous

Anonymous.

Case 5.

Words taken *in mitiori ſenſu.*

ACTION for theſe words, "Thou haſt ſitten upon the pillory;" but ſaith not in what manner.—HARRIS moved, that the words are not actionable; and ſo it was the opinion of the Juſtices, who ſaid he might well demur upon them.

Donne's Caſe.

Case 6.

Words actionable. Poſt. 384. 470. Moor, 243. Cowp. 276.

ACTION for theſe words, "If you had your deſerts, you had "been hanged before now."—COKE moved, that the action did not lie, for that he did not ſhew any cauſe why he ſhould be hanged, and deſerts might be in his mind concerning God. —CURIA *contra.* For it ſhall be intended, he had committed an offence, for which the penalty of death was due to him.—WRAY, C. J. ſaid, it hath been adjudged, that where one writ the name of another upon a wall, and writ alſo, that "if this man had his de-"ſerts, he ſhould have been hanged on theſe gallows," and drew a pair of gallows on the wall; it was adjudged, that an action did lie for this.

Gallies *againſt* Budbery.

Case 7.

A plea of *covenants performed*, where ſome are affirmative, and ſome negative, is bad.—Where a term is pleaded, the commencement of it and the time unexpired ought to be ſhewn.—Where an act is to be done upon requeſt, the requeſt muſt be made within the time limited. Poſt. 232. Co. Lit. 303. b. Cowper, 578.

DEBT upon an obligation. The caſe upon demurrer was, The plaintiff being poſſeſſed of a term for ſix years of a tavern in *Gracechurch-Street*, let the ſame by indenture, with plate, and divers utenſils in the houſe, to the defendant for three years. The defendant, in conſideration thereof, did covenant with him and his aſſignees, that *de menſe in menſem menſatim*, he would upon requeſt render to him and his aſſignees an account for every tun of wine he did ſell there, and pay him for every tun ſold thirty ſhillings; and there were divers other covenants on his part (ſome in the affirmative, and ſome in the negative). He pleaded *covenants performed* (which was ill in that). The plaintiff replieth, that upon the laſt day of *July*, he required the defendant to give him an account of a tun of wine ſold at ſuch a time, which he refuſed to do. The defendant rejoined, that before that time, the plaintiff being poſſeſſed of a term in the tavern for divers years, part whereof were yet to come (but doth not ſhew what time in certain, nor the commencement of it; and therefore it was agreed by all, it was ill in that), granted the reſidue of the ſaid term then to come to *B.* to which grant he attorned; after which time he did not refuſe; and upon this the plaintiff demurred.

DREW *for the plaintiff* argued, that notwithſtanding the reſidue of the term was granted over, yet the account was to be made to the plaintiff, and not to the aſſignee, for it is a thing collateral; and the aſſignee is to have only that which goeth with the houſe; and aſſignee is, in deed and law, as an executor.

COKE *contra.* For this is as a rent reſerved, and in nature and *lieu* of the rent: but he ſaid, that the requeſt of an account was to be within the month; and this requeſt, as appeareth by computation, was the day after the month; which being referred to KEMPE, he certified the ſame accordingly; and for that cauſe judgment was given againſt the plaintiff.

8. Co. 120. b. Poſt. 284. 318.

Worceſter

Worceſter *againſt* Stone.

CASE 8.

Trinity Term, 27. Eliz. Roll 453.

THE caſe upon ſpecial verdict was, The plaintiff made a leaſe to the defendant for years rendering rent, upon condition, that if the rent were behind at the day, and ten days after (being in the mean while demanded), and no diſtreſs to be found upon the land, that the plaintiff might re-enter. The jury found, that the rent was behind at the day, and ten days after, and that a ſufficient diſtreſs was upon the land till three of the clock in the afternoon of the tenth day; at which hour the leſſee drove out his cattle, and at the laſt hour of the tenth day, the leſſor came and demanded the rent, and it was not paid, nor any diſtreſs upon the land. The queſtion was, If the condition was broken?—DANIEL *for the plaintiff* argued, that the condition was broken, for there was no diſtreſs at the time of the demand; and the words are, "if "it be lawfully demanded and no diſtreſs found, &c." And it is not ſufficient to have it at any time of the ten days, but at the proper time for the demand, which is the laſt inſtant of the tenth day: for otherwiſe, if there be a diſtreſs at any time within the ten days, though but for a quarter of an hour, it would diſpenſe with the condition; and then the leſſor muſt attend all the ten days, which would be inconvenient.—WRAY, C. J. and SCHUTE, *J.* The condition is not broken; for the intent of the words is, if no diſtreſs be found at any time within the ten days, then a re-entry; and therefore, if a diſtreſs be found there at any time within the ten days, this is ſufficient.—CLENCH doubted. But it was afterwards adjudged againſt the plaintiff, becauſe he made no demand in the mean time (*a*).

A condition of re-entry, if rent be in arrear for a certain ſpace of time, after being demanded, and no diſtreſs on the premiſes, *is not broken*, if no demand be made within the time, though the goods are removed from the premiſes before the time for making the demand ultimately expires. Ante, 15. Dougl. 483. 486.

(*a*) See 4. Geo. 2. c. 28. ſ. 2.

Sir John Parrot's Caſe.

CASE 9.

COKE ſaid, it was adjudged in that caſe, that a debt upon record by recovery, or otherwiſe, cannot be attached by the cuſtom of the city of *London*.

A judgment debt cannot be attached. Poſt. 886.

1. Roll. Abr. 552. 2. Leon. 29. 3. Leon. 240. Dyer, 247. 1. Roll. Rep. 105. 1. Bac. Abr. 691. Dougl. 363.

Madox's Caſe.

CASE 10.

AN indictment againſt him was reverſed, becauſe the indictment was of a nuſance to a horſeway, whereas it ought to be the queen's high-way, or the high-way.

Indictment quaſhed. Co. Lit. 56. a. 1. Hawk. P. C. 366. Ld. Ray. 1174. Salk. 359. 3. Bac. Abr. 60.

Robert Browne and Uxor *againſt* Garborough.

CASE 11.

ASSUMPSIT. And declareth of a promiſe made to the *feme dum ſola fuit*; and alledgeth, that whereas a communication was between *Jo. Browne*, father of the plaintiff *Robert*, and the defendant, couſin of the ſaid *Robert Browne*, and the ſaid *feme*, when ſhe was ſole, of a marriage to be had between the ſaid plaintiffs; and the ſaid *Jo. Browne* promiſed to the *feme*, that if the marriage did take effect, that he would aſſure to them ſuch land, &c. and that another did not aſſure certain lands to her upon that event.—Poſt. 619. Cro. Jac. 228. Cow. 742.

An aſſumpſit will lie on a *promiſe* to pay a woman a ſum of money in *conſideration* that ſhe intermarry with the plaintiff,

And

BROWNE and UXOR *against* GARBOROUGH.

And the defendant did then promise to her, that if *Jo. Browne* did not perform his promise, the defendant would give her one hundred pounds; and alledges, that the marriage did take effect, and the lands were not assured, &c. Upon *non assumpsit* it was found for the plaintiff.—SHUTTLEWORTH, *serjeant*, moved in arrest of judgment, that there was no sufficient consideration to ground the promise; for the *feme* was a meer stranger to the defendant; and there was no reason for him to give her one hundred pounds in marriage.—GAWDY and SCHUTE conceived it a good consideration; for it was alledged, that the defendant was kinsman to *Ro. Browne* the plaintiff; and it is to be intended, that by reason of these words she was induced to marry *R. Browne*, which otherwise she would not have done; and they commanded judgment to be entered for the plaintiffs: and upon a writ of error brought, the judgment in *Trin.* 30. *Eliz.* was affirmed; for peradventure she trusted the defendant rather than *Jo. Browne*, and the defendant was cousin to the said *R. Browne*, plaintiff.

CASE 12.

Yate, Brooke, Clement, and duo alii *against* Windnam.

A writ of partition between tenants in common, need not shew the titles of the plaintiffs; nor can a release to one of the defendants be pleaded in discharge of the others; and if they come in upon the *pone*, and not upon the *first summons*, the judgment shall be *in misericordia*.

Ante, 57. Post. 155. 288.

ERROR upon a judgment given in *a writ of partition* against the now plaintiffs, at the suit of the now defendant.—Divers errors were assigned. The defendant pleads a release of all errors made to him by the said *Brooke* and *Clement*, who were summoned and severed; and concluded upon it against them all; and demanded judgment *si actio*. Upon this it was demurred in law.—TANFIELD *for the plaintiffs* argued, that the judgment shall be reversed.—The first error was, that the said *Windnam*, plaintiff, in the writ of partition demanded partition, according to the *Hen.* 8. *c.* 32. and declared, that whereas he and the others held 400 acres of land in common, in six parts, to be divided, *viz.* the plaintiff *W.* two parts; the said *Brooke* one part; the said *Clement* one other part; and the other two, each of them a moiety of the other sixth part, &c. but shewed not their several titles to the said six parts; nor any manner of title, how the lands ought to be divided in that manner; and therefore the declaration is not good, for the writ and declaration ought always to comprehend their title; and therefore in a common writ of partition between coparceners, it comprehends the title, that it was the inheritance of their ancestor, and descended to them, *à fortiori* in this case where their parts are so unequal. And although in a writ of partition no land is demanded, yet it ought to comprehend their title, 36. *Hen.* 6. in a *quem redditum reddit*, which demands no rent or land, yet he ought to make a title; for he demands an attornement upon a grant of a rent, which is against common right. So 11. *Hen.* 4. in waste brought by two, supposing it to the disinheritance of one, they ought to shew how their title came to the land, in this manner to have an action, which is so against common right. So in every writ of waste, he ought to make title, *viz.* that he demised the land, or that he had the reversion *ex assignatione*; and he cited a judgment in a writ of error between *Hide and Unton*, that in a writ of partition, the title must be comprehended in the writ of declaration, specially between jointenants, or tenants in common.—Second error was, that the defendants in the writ of

Co. Lit. 168. a. 8. Co. 97. b. 3. Com. Dig. 37. 3. Bac. Abr. 212. Cowp. 219.

of error did come and confeſs the partitions, yet it was awarded that the defendants ſhould be *in miſericordiâ*, which is not to be in this action, where there is no *tort* objected againſt them, and when they confeſs the action.—3. Error, for that upon the judgment after the writ of partition was returned ſerved, in all points, by the ſheriff, the words of the judgment are, that *partitio prædicta inter partes prædict' ſtabilis et firma teneat*, whereas it ſhould be *teneatur*. But upon the view of the record, it was *teneatur*.—4. As to the matter of the demurrer, if this releaſe (admitting the judgment to be erroneous) doth bar them all of a writ of error: and he conceived it did not, for it is meerly real, to which all the parties have intereſt; and though the judgment be intire, yet this releaſe is no bar, but the judgment ſhall be intirely reverſed; as 45. *Edw.* 3. *pl.* 10. two coparceners have title to a writ of ward of the body; one releaſeth, this doth not bar the other, but he ſhall recover the entire for both: ſo 30. *Hen.* 6. in an aſſiſe by two, one releaſeth, this doth not bar the other, it being a thing of inheritance; ſo in this caſe. But afterwards GAWDY, *ſerjeant*, who argued for the plaintiff, did agree that this releaſe can be no bar to the other.—And *Hill.* 30. *Eliz.* the caſe was argued at large by GAWDY and COKE, that the declaration need not comprehend the title, for it ſhall be intended that they have the fee-ſimple, till the contrary doth appear; and by intendment he that bringeth the action cannot have conuſans of the title of the others, for every of them cometh in by a ſeveral title; and they ſhewed divers writs and declarations of partition, and one in *Michaelmas* 26. & 27. *Eliz.* in *Cheney* v. *Berry*, that in a writ of partition between tenants in common, title needed not be ſhewn. And of that opinion was the whole Court, and ſaid they would not reverſe the judgment contrary to ſo many precedents.—As to the ſecond error, that the judgment was *idem in miſericordiâ*, they ſaid if the defendant came in upon the firſt ſummons, and ſuch judgment be given, it is erroneous, but it was alledged they came in upon the *pone* (*a*), and then it is good. The Court moved the parties to agree, but afterwards the plaintiffs cauſed the writ to be diſcontinued (*b*).

YATE, & others *againſt* WINDHAM.

(*a*) 5. Co. 49. Co. Lit. 126. Cro. Car. 564. 8. Co. 61.

(*b*) See the queſtion revived upon a writ of diminution, Poſt. 155. 281.

See 8. and 9. Will. 3. c. 37. and 7. Ann. c. 18.

The Biſhop of Glouceſter's and Savacre's Caſe.

CASE 13.

ERROR upon a judgment given againſt them in a *quare impedit* brought by the queen, in which the biſhop pleaded that he claimed nothing but as ordinary, &c. The queſtion was, If the writ lieth in both their names, or ought to be brought only in the name of *Savacre?*—COKE argued, that the biſhop ought not to join in the writ, for he had no loſs, and relied upon the caſe 29. *Aſſ.* 14 *Attaint*, and 6. *Edw.* 3. *pl.* 7.—MALLORY and WINTER, *contra*, for the biſhop is party to the record, and relied upon 3. *Edw.* 3. and 2. *Edw.* 3. and they ſaid a writ of error in this caſe is but as a commiſſion to examine errors, as 10. *Hen.* 4. *pl.* 4. is, and if more be named in a commiſſion than needeth, it is not material.

In *quare impedit*, if judgment be againſt the biſhop and incumbent, the biſhop may join in a writ of error, though he claimed but as ordinary. 3. Leon. 176. 3. Mod. 134. Cro. Jac. 94. 5. Mod. 69. Carth. 376.

Stra. 606. 5. Mod. 16. 12. Mod. 1, 2. 130. 370. 8. Mod. 305. 316. Ld. Ray. 71. 2403.

Gloucester and Savacre's Case.

Afterward it was awarded that the writ was well brought; for Wray said, the bishop hath loss, for by this judgment the writ shall be to the archbishop for admission and institution, and so he hath loss, and therefore may join.

Case 14.

Bracebridge *against* Vaughan.

The marshal of the king's bench prison is within the 23. *Hen.* c. 6. 10. although not expressly named. 10. Co. 101. b.

Debt upon an obligation. It was agreed by the Court, that where the marshal of the queen's bench taketh bond for the easement or delivery of a prisoner in execution, this is void by the 23. *Hen.* 6. c. 10. although he be not named in the statute: for Wray said, divers persons are intended in the purview which are not mentioned in the statute. 1. *Syd.* 383. *contra.* Poph. 165. Dyer, 324. 1. Saund. 162.

Case 15.

Hare *against* George.

Plea "*an award*" in bar to trespass must alledge *the place* of submission and performance; and answer the *vi et armis*.

Trespass. The defendant pleads an arbitrement in bar, that the defendant should pay to the plaintiff twenty shillings, upon which the plaintiff demurs, because he doth not alledge a place where the submission was, 9. *Hen.* 6. *pl.* 5. and doth not alledge performance of the arbitrement, and doth not answer to the *vi & armis*; and for these causes it was adjudged for the plaintiff. Post. 78. 98. Lut. 1142. 1501. Salk. 4.

Case 16.

John Fuller *against* Robert Spackman.

It need not be averred in pleading that an award was authorised by and within the terms of the submission.

Yelv. 78. 2. Saund. 102. 326. Hob. 199. Lutw. 528.

Debt upon an obligation. The condition was to stand to the arbitrement of *Thomas Coleshill* of all matters, suits, quarrels, actions, and debates whatsoever now depending between them, being at suit of law, or otherwise in controversy between them, so as the award be made before such a day, &c. in writing. The defendant pleads the arbitrement in writing made such a day in this manner, that the plaintiff shall enjoy quietly certain tythes in *D.* without interruption of the defendant, &c. and that he had suffered him to enjoy them, &c. which is all contained in the arbitrement, and demands judgment, &c. The plaintiff replieth, that besides that the said *T. Coleshill* did by the said writing award that the defendant at a day, &c. should pay to the plaintiff five pounds in full satisfaction of all accounts, suits at law, arrearages of tithes, and tithes unjustly taken at any time from the beginning of the world to the day of the obligation, &c. and alledges that the defendant did not pay the five pounds, and so assigned the breach, &c. Upon this it was demurred, and the cause was, because the plaintiff did not aver that there was any suit depending, &c. at the time of the submission; for if there was not, the award was void and out of the submission. But without any great argument it was adjudged by Schute and Gawdy (being only present) for the plaintiff, and their reason was, that it shall be intended to be awarded for matters in suit, and an averment needs not, for otherwise every award may be avoided by such *nude* surmise.

Clecott

Clecott *againſt* Dennys.

CASE 17.

Eaſter Term, 59. *Eliz. Roll* 144.

ACTION upon the caſe. And alledgeth, that he had ſued a *latitat* againſt *J. S.* directed to the ſheriff of *Devon*, intending to declare againſt him in debt, and *J. S.* was arreſted, and in priſon at his ſuit; the defendant pretending to be deputy to the ſheriff, took bond of him, and let him at large, by which he had loſt his ſuit, &c. The defendant pleads, that the ſheriff made him his deputy to bail all priſoners bailable in the ſaid county, and thereupon he took bond of *J. S.* and delivered it to the ſheriff, and let him at large, &c. Upon this it was demurred, becauſe he doth juſtify as deputy, and ſheweth no deed of deputation, 28. *H.* 8. *Brook, Deputy*, 17.

A *deputy* may be appointed without deed; but an *aſſignee* cannot. 10. Co. 92. 3. Mod. 150. 1. Leon. 119. Caſes in L. & E. 74.

WYATT argued that a deputation is good without deed, for a deputy doth things only as a ſervant, and in right of his maſter, and ſo may be made without deed; otherwiſe of an aſſignee, 11. *Edw.* 4. *pl.* 1. 12. *Edw.* 3. "*Monſtrans de Faite*," 65. And of that opinion was GAWDY. *Vide* 23. *Edw.* 3. *Barr.* 259. 8. *Rich.* 2. "*Avowry*," 260.

Sir Anthony Sturlyn *againſt* Albany.

CASE 18.

ASSUMPSIT. The caſe was, The plaintiff had made a leaſe to *J. S.* of land for life rendering rent. *J. S.* grants all his eſtate to the defendant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who aſſumed that if the plaintiff could ſhew to him a deed that the rent was due, that he would pay to the rent and the arrearages; the plaintiff alledgeth that upon ſuch a day of, &c. at *Warwick*, he ſhewed unto him the indenture of leaſe, by which the rent was due, and notwithſtanding he had not paid him the rent and the arrearages due for four years. Upon *non aſſumpſit* pleaded it was found for the plaintiff; and damages aſſeſſed to ſo much as the rent and arrearages did amount unto.—And it was moved in arreſt of judgment, that there was no conſideration to ground an action, for it is but the ſhewing of the deed, which is no conſideration.—2. The damages ought only to be aſſeſſed for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action ſhall be no bar in another action. But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never ſo ſmall, this is a ſufficient conſideration to ground an action; and here the ſhewing of the deed is a cauſe to avoid ſuit; and the rent and arrearages may be aſſeſſed all in damages: but they took order that the plaintiff ſhould releaſe to the defendant all the arrearages of rent before execution ſhould be awarded.—NOTA. In this caſe it was alledged that it hath been adjudged, when one aſſumeth to another, that if he can ſhew him an obligation in which he was bound to him, that he would pay him, and he did ſhew the obligation, &c. that no action lieth upon this *aſſumpſit*; which was affirmed by the Juſtices.

If an under leſſee promiſes the original leſſor to pay him the rent and arrearages if he can ſhew him a deed by which it was due, and the leſſor ſhews him the leaſe, it is a ſufficient conſideration to maintain *an aſſumpſit*; but no action lies on a *promiſe* by an obligor of a bond, in conſideration that the obligee produces it. Poſt. 70. 75. 150. 470. 644. Cro. Jac. 343. Cro. Car. 70. Cowp. 230. 250.

Lord Mordant *againſt* Bridges.

CASE 19.

ACTION DE SCANDALIS MAGNATUM, for theſe words, "My lord *Mordant* did know that *Prude* robbed *Shotbolt*, "and

Words actionable. Moor 686.

Ld. Mordant *againſt* Bridges.

" and bid me compound with *Shotbolt* for the ſame, and ſaid he " would ſee me ſatisfied for the ſame, though it coſt him an " hundred pounds; which I did for him, being my maſter, other- " wiſe the evidence I could have given would have hanged " *Prude.*" (Nota, in truth he ſpake thoſe words before *Juſtice* Schute, in an evidence in conſpiracy by *Prude v. Shotbolt*; but it was not ſo alledged now.) Upon not guilty pleaded, it was found for the plaintiff, damages a thouſand pounds. And by Popham and Egerton it was alledged that the action did not lie; for the words " he knew, &c. are not actionable: for a man that knoweth another hath committed felony, is not bound to purſue him. And as to the other words, " he commanded him to com- " pound, &c." he might lawfully compound with the party robbed to ſtop his appeal, and to the intent he might get his pardon in the mean time. But it was adjudged for the plaintiff; for the words ſhall be taken as ſpoken in the worſe ſenſe, and to the diſgrace of the ſaid plaintiff, &c.—A writ of error was brought in the exchequer chamber, and error aſſigned in the point adjudged.

Poſt. 537.

Case 20.

Bright *againſt* Hubbard.

Hillary Term, 27. Eliz. Roll 128.

A copyhold ſurrendered to the uſes of the will, on a deviſe to a wife for life, with liberty to ſell the reverſion for the payment of debts, is good. 3. Leon. 18. Gilb. Ten. 275.

J. S. ſeiſed infee of copy-hold land, deviſed it to his wife for life, and that ſhe ſhould ſell the reverſion for payment of his debts, and after in court did ſurrender the land to the uſe of his wife for life, according to his will and deed. The queſtion was, If the wife could ſell the reverſion? And adjudged ſhe might; for he having made his will before, and deviſing it in ſuch manner as aforementioned, and after ſurrendering it, &c. and referring it to his will; this is to be intended according to the intent there limited and appointed; and ſhe ſurrendering it upon condition to pay twelve pounds, this was held a good ſale according to the will.

Case 21.

Anonymous.

Money paid in diſcharge of *a bond* cannot be applied to the payment of *a book debt*, at the option of the creditor. Styles, 239. 2. Bro. 107. 5. Co. 117.

DEBT upon a bond. The caſe was, The defendant did owe to the plaintiff certain money upon a bond, and certain money for wares ſold, as it appeared by his book. At the day of payment upon the bond, he tendered the money according to the bond; the plaintiff did accept it, and ſaid it ſhould be for the debt due by his book, and not for the other debt; but the defendant ſaid he paid it upon his bond, and not otherwiſe; and the plaintiff croſſed his book, pretending the book-debt to be diſcharged, and brought debt upon the bond. And it was adjudged againſt him; for the payment is to be in that manner that the defendant would pay it, and not according to the words of the plaintiff how he would accept it.

Case 22.

Frith's Caſe.

Judgment ſhall not be reverſed becauſe the defendant has neglected to plead good matter in *bar*, or in *abatement* to the action. Poſt. 110. Cowp. 728. 1. Term Rep. 689.

DEBT upon two obligations, of which one was not then forfeited, for the day of payment was not come. The defendant pleads to that a releaſe, and took no advantage of it, that it appeared it was not forfeit: to the other he pleaded another

plea

plea, and upon both they were at iſſue, and found for the plaintiff. And this matter was alledged in arreſt of judgment, that it did appear upon the obligation ſhewn, that the day of payment was not yet come, and ſo the plaintiff is not to have judgment upon it. But it was adjudged for the plaintiff for both; becauſe the defendant might have taken advantage of it, but did not; but waived it, and pleaded a collateral matter, which was found againſt him. 9. *Edw.* 4. the defendant pleads that the plaintiff had a co-executor who was in life, which had releaſed to him; and upon this they were at iſſue; and found for the plaintiff, and awarded he ſhall recover, becauſe the defendant might have abated the action being brought by the plaintiff alone, and had waived it. BARTLET of counſel with the plaintiff. FAITH's CASE. Ant. 41. Poſt. 112.

Forde *againſt* Rolls. CASE 23.

ASSUMPSIT by the plaintiff as adminiſtrator of *J. S.* againſt the defendant, upon a promiſe made to the teſtator; after iſſue the plaintiff was non-ſuited.—GOLDING, *for the defendant*, prayed coſts upon the 8. *Eliz.* c. 2. which giveth coſts againſt him that ſueth maliciouſly; but if the ſuit had been upon a bond or record, or ſhop-book, and the money had been paid, yet no coſts; for he had a ground and colour of ſuit.—THE COURT denied to give coſts; for it cannot be ſaid to be ſued maliciouſly, being for another; neither can it be known but the plaintiff had colour to ſue. 553. 1. Bac. Ab. 518. 2. Bac. Abr. 446.

An adminiſtrator not liable to coſts on 8. *Eliz.* c. 2. on being non-ſuited in *aſſumpſit* upon a promiſe to his inteſtate. Cro. Car. 229. Sti. 871. 2. Com. Dig.

Scavage *againſt* Freeman, &c. CASE 24.

APPEAL by the plaintiff againſt *Freeman*, and four others as principals, and againſt *More* as acceſſary. The plaintiffs, after the parties who were appealed, had appeared, declared againſt all the principals together in *French*; and after, againſt the acceſſary in *French*. The four principals ſeverally by himſelf made their defence in *French*, which was, "*Vous aves ceſty I. Freeman, "in proper perſon que defend' le tort & force & touts felonies & "murders & ceo que eſt encounter le corone & dignity de noſtre ſeigniore "le Roigne & tout ceo que le defend' doit & demand oyer de breief & "returne de ceo,*" which was read; and then he pleaded in bar in French, "*que de ceo felony in ceo manner que il eſt appell il neſt cul-"pable & ceo il eſt priſt de prover per ſon corps,*" and ſo waged battle; and in the ſame manner it was done by the three other principals, and the fifth principal and the acceſſary pleaded ſeverally not guilty, and put himſelf upon the country (*a*).

Iſſue joined in battle by ſome of the appellees; not guilty pleaded by others; and the proceedings in French. 1. Sid. 324. 2. Jones, 210. 1. Salk. 61. 2. Hawk. 437.

(*a*) See 37. Ed. 3. c. 15. 4. Geo. 2. c. 26. and 6. Geo. 2. c. 6.

Cranmer's Caſe. CASE 25.

NOTA. WALMSLEY, *ſerjeant*, ſaid it was adjudged in that caſe, that whereas the queen had granted lands, reſerving a fee-farm rent, with a condition of re-entry for non payment, and afterward the queen grants the fee-farm rent to *J. S.* in fee, and then the rent was behind, that the queen ſhall not re-enter; for by that means ſhe ſhould defeat her own grant, which would be a *tort* to the grantee of the rent.

The queen ſhall not re-enter ſo as to defeat her own grant. Cowp. 597.

CASE 26.

Foſter *againſt* Scarlet.

A promiſe to convey lands in conſideration of being releaſed from debts is good; and if the conveyance is to be made by *two*, and it is ſtated that the requeſt was made *ſibi* it is good, for *ſibi* is referable to both. Ante 4. 67. Poſt. 75. Cowp. 290.

ASSUMPSIT. The plaintiff declared, that whereas he and one *Willington* ſubmitted themſelves to the arbitrement of *A.* and *B.* of all matters, &c. the ſaid *A.* and *B.* awarded that the plaintiff ſhould releaſe to the ſaid *Willington* all debts which he owed him; and that *Willington* ſhould aſſure to the plaintiff certain lands which he held for life, the reverſion to the plaintiff; and that the defendant and one *Putter*, who pretended to have a leaſe in the ſaid lands, ſhould ſeal a deed to the plaintiff, that they ſhould aſſure to the plaintiff their leaſe and intereſt in the ſaid lands: and further alledgeth, that after the ſaid arbitrement, in conſideration that the plaintiff did aſſume to the ſaid *Willington*, to ſtand to and perform the ſaid arbitrement, the defendant did aſſume, that he and the ſaid *Putter*, upon a requeſt made *ſibi*, would convey the ſaid land to the plaintiff: and further alledgeth, that he had performed the ſaid award on his part, and that he had requeſted the defendant, that he and *Putter* would convey the ſaid land, &c. which they had not done. Upon *non aſſumpſit* it was found for the plaintiff, and it was alledged in arreſt of judgment, that here is no conſideration to bind the defendant, for he took no benefit thereby. But THE COURT held clearly the contrary, that it was a good conſideration, for by reaſon of the promiſe the plaintiff was drawn to make the releaſe; and it is not material that the defendant took no benefit by it.

SECONDLY, It was alledged, the defendant did aſſume that he and *Putter* upon requeſt made *ſibi* would convey, and no requeſt is made to *Putter*, but only to the defendant; and it ought to be made to both, for *ſibi* is the plural number, and ſo ſhall be intended, upon a requeſt made to both. But COKE and GODFREY argued that the word *ſibi* may be referred to the defendant only, for this word comprehends the ſingular number as well as the plural, and ſo may be referred to the defendant that is firſt named; and the requeſt is to be made to him that did promiſe, which is the defendant; and relied upon 22. *Edw.* 3. *pl.* 4. But the Juſtices ſaid that the word *ſibi* is to be referred to both, for both are to do the act: and it was afterwards adjudged that the plaintiff *nihil capiat per billam.*

CASE 27.

Knight *againſt* German.

Trinity Term, 29. Eliz. Roll 669.

An action will not lie for indicting a man for felony unleſs it be done *maliciouſly* and without *probable cauſe.* Poſt. 134. 564. 1. Jones, 93. 2 Leon. 107. Palm. 315. Cro. Jac. 130. 357. 490. Latch. 79. Cro. Car. 15.

ERROR upon a judgment in an action upon the caſe. Two errors were aſſigned. Firſt, for that in the ſaid action the then plaintiff declared, that whereas he was of good name and fame, the now plaintiff intending to detract from his name and fame, and put his life in jeopardy, did maliciouſly cauſe a bill of indictment of felony to be written, and the ſame being ſo written, at ſuch a ſeſſions of the peace at *Newgate*, exhibited the ſame to the grand jury, ET *falſò depoſuit omnia in ea contenta fore vera*; whereupon he was indicted of the ſame felony, and after arraigned, was found not guilty, and thereupon brought the action. Upon not guilty pleaded, it was found for him; for which he had judgment to recover ſeventy-two pounds for damages and coſts; *ubi*

revera

revera upon this matter ſhewn, no action doth lie.—Secondly, that the exigent upon the judgment ſuppoſeth only ſeventy pounds was recovered, and not more.

KNIGHT *againſt* GERMAN.

As to the firſt matter the Court was in doubt; but WRAY, C. J. ſaid, that this indictment being written and preferred maliciouſly, it is not reaſon but an action ſhould lie to puniſh it; and if two conſpire maliciouſly to exhibit an indictment, and the party be acquitted, he ſhall have a conſpiracy; ſo when one doth it, this action upon the caſe lieth.—But SCHUTE and GAWDY *contra*, that the action doth not lie, for then every felon that is acquitted will ſue an action againſt the party.

1. Hawk. P. C. 347. 349. 1. Term Rep. 493. 520 538. 2. Term Rep. 225. 231.

But for the ſecond error, they held clearly it was well aſſigned, for there was no ſuch judgment for ſeventy pounds; and though it was the default of the clerk, yet it cannot be amended to make the outlawry good. And it being moved at another day, the opinion of all the Court was, that the action lieth not when the indictment is preferred by the party grieved, and he purſueth it according to the law: and the ſtatute of *Weſtm.* which doth give damages where the party is acquitted, doth prove this, and this caſe remaineth at common law. *Vide* 27. *Hen.* 8. 27. *Aſſ.* 12. & 7. *Hen.* 6. *pl.* 14.

If judgment be recovered for one ſum, and the *exigent* in ſuing to outlawry ſuppoſes it another, it is error.

Savel *againſt* Wood.

CASE 28.

PROHIBITION againſt a parſon who ſued for tithes in the ſpiritual court: and ſurmiſed that the clerk of the ſaid pariſh, and all his predeceſſors, aſſiſtants to the miniſter there *divina celebranti*, had uſed to have five ſhillings of him, &c. for the tithes of the place where, &c.—COKE ſaid this preſcription is void, for it is in one perſon only that hath no perpetuity, but is dative and removeable, 32. *Hen.* 6. *pl.* 5. And if it be a good ſurmiſe, yet there is no cauſe but a conſultation ſhall be awarded, for it is to come in queſtion in the ſpiritual court, whether the parſon or clerk hath right to the tithe? And he ſaid it was lately adjudged in *Buſh v. Hunts*, where the vicar ſued for tithes, and a prohibition prayed upon ſurmiſe, that he had uſed time out of mind to pay the tithes to the parſon; that it was not a ſufficient ſurmiſe for a prohibition to entitle another to the tithes, for that ſhall come in queſtion in the court-chriſtian.

On a ſuggeſtion in prohibition of a modus to pay ſo much a year to the pariſh-clerk in lieu of tithes to the rector, a conſultation ſhall be granted.

Poſt. 136. 251. 276. 307. 317. Moor, 908. 1. Leon. 94. Cowp. 422.

NOTA. Afterwards, *Hill.* 30. *Eliz.* it was moved again by GAWDY and FLEETWOOD, *ſerjeants*, for the plaintiff, that it was a good preſcription, becauſe the parſonage was a parſonage impropriate, and by intendment it commenced by the act of the parſon, *viz.* that he made a compoſition that the tithe of that land ſhould be paid to the clerk in diſcharge of himſelf, and that he had uſed time out of mind, &c. to pay to the clerk five ſhillings in diſcharge of all tithes, &c.—THE COURT ſaid, if this ſpecial matter be ſhewn in the furmiſe, perhaps it might be good by reaſon of the continuance, and that by this the parſon is diſcharged from finding the clerk, with which peradventure he ſhall be charged, and ſo is as a payment of tithes to the parſon himſelf; but ſuch matter is not ſhewn, and by common intendment tithes are not to be paid to the pariſh-clerk, and he is no party in whom a preſcription can be alledged; and thereupon they awarded a conſultation.

Case 29.

Topliffe *againſt* Wilſon.

Words actionable.

ACTION for theſe words: "*Mr. Topliffe* hath forged and counterfeited a certificate to a commiſſion out of the exchequer, and hath forged and counterfeited *Mr. Bircket's* and *Mr. Savel's* hands, the commiſſioners, and hath put their hands to it, by reaſon whereof he got a verdict in the exchequer, whereas otherwiſe he muſt needs have had the foil."—Upon not guilty, it was found for the plaintiff, damages ten pounds. And it was alledged in arreſt of judgment, that the action doth not lie, becauſe it was not ſhewn what commiſſion it was, nor in what ſuit, ſo as the defendant might give anſwer to it; but judgment was given for the plaintiff.

Case 30.

Ards *againſt* Simpſon.

Warranty by tenant for life will not bind the heir, a *feme covert*, in remainder; and ſhe may enter alone, and bar the fine.

EJECTIONE FIRMÆ. Upon ſpecial verdict, the caſe was, the father was tenant for life, the remainder to his daughter and heir apparent (being a *feme covert)* in fee. The father makes a feoffment to divers uſes with warranty, and after levieth a fine with warranty and dieth. The daughter for herſelf, and in the name of her *baron*, and by his conſent, enters within the year after the fine, claiming the land as her inheritance, and afterwards they let the land to the plaintiff. Two queſtions. *Firſt*, If this entry by the *feme* only be good? *Secondly*, If this warranty, deſcending upon her during the coverture, ſhall bind her?

Co. Lit. 366. a. 1. Wood's Con. 8. 2. Salk. 685.

And it was held by the Juſtices, that this entry by herſelf alone (the *baron* agreeing to it) is good.

Secondly, That the warranty deſcending upon her during the coverture, where her entry is congeable, doth not bind her.

And at another day, FULLER and GRAY moved, that although the warranty doth not bind the *feme* after the death of the *baron*, yet it ſhall bind the huſband, for he might have entered before the deſcent of the warranty, which he not doing, is bound as a deſcent during the coverture. But it was adjudged for the plaintiff, for the warranty doth not deſcend upon the *baron*, but upon the *feme* only, and being void to bind her, ſhall not bind him (*a*).

(*a*) By 4. Ann. c. 16. ſ. 21. all warranties, by any tenants for life, deſcending to any perſon in remainder or reverſion, are void; and all collateral warranties, where the anceſtor had no eſtate of inheritance in poſſeſſion, are void againſt the heir. Co. Lit. 373. b.

Case 31.

Mary York *againſt* Allen.

If a pardon relates back to a day before the *exigent* was awarded, the outlawry is thereby diſcharged.

SCIRE FACIAS upon a recognizance. The caſe was, One was *quarto exactus* in an action againſt him, and afterwards was *quinto exactus*, 23. *Nov.* 27. *Eliz.* and afterwards the pardon came, which had relation to all offences before the firſt of *November*. If by this the outlawry be diſcharged? was the queſtion; for the outlawry was after the time unto which the pardon had relation. And *primâ facie* the Juſtices held that it was diſcharged; but they would adviſe. *Vide* 36. *Hen.* 6. *pl.* 25. & 37. *Hen.* 6. *Quartermain's Caſe.* The next day it was moved again; and it was then adjudged that the outlawry was diſcharged and void, for the contempt and offence was pardoned, and then the outlawry after is void.

2. Rac. Abr. 378. 5. Co. 49. a. b.

Scot

Scot *againſt* Scot.

CASE 32.

THE caſe was, Recoverers to an uſe before the 27. *Hen.* 8. c. 10. make a leaſe for 99 years by indenture, rendering 10 l. *per annum*. The leſſee by the ſame indenture covenanted with the recoverers that he will pay the rent to *ceſtui que uſe* his heirs and aſſigns; PROVISO SEMPER, that if the *ceſtui que uſe* doth not make his heir male his aſſignee, that then he ſhall pay the rent to the recoverers, their heirs and aſſigns. Afterwards *ceſtui que uſe* dieth, and doth not make his heir-male his aſſignee; the leſſee doth not pay the rent to the recoverers. The queſtion was, If his eſtate was forfeited, and that this *proviſo* makes his eſtate conditional? —After argument, it was adjudged that it was no condition that went to the eſtate, but only abridged the covenant.

In what caſe a *proviſo* does not make *a condition*, but only abridges the *covenant*.
S. C. 2. Leon. 128.
3. Leon. 225.
Moor, 107.
Dyer, 222.
Poph. 119.
2. Co. 72.
1. Bac. Abr. 397.
1. Wood's Com. 370.

THEN was another queſtion, If the rent be reſerved at two feaſts, *viz. Michaelmas* and *Lady-day*, and it is arrear at *Lady-day*, and not demanded at that day, if he may demand all at *Michaelmas-day*? And it was held he cannot, and a demand in that manner is void for all.

At what time rent muſt be demanded.
Poſt. 242.
2. Co. 72. a.

Allen *againſt* Andrews, of Gray's Inn.

CASE 33.

Trinity Term, 29. Eliz. Roll 1003.

DEBT upon an obligation of 300 l. which was conditioned to pay 14 l. yearly to the party, during the life of the wife of the defendant, at *Michaelmas*, or within one month after, at *D.* The defendant pleads, that two days before the end of the month he came to *D.* and there tendered the 14 l. and none was there to receive it; which matter, &c. and concluded not, that he was *tout temps priſt*; and upon this it was demurred in law, if this tender were good.

A tender at the place where money is appointed to be paid, two days before it becomes due, is void. Ante 14.
Co. Lit. 211.
Plowd. 172.
5. Co. 114.
12. Mod. 421.
Ld. Raym. 623.

THE JUSTICES held, that if the tender had been to the plaintiff himſelf in perſon, within the month, if he had come thither, this peradventure had been good; but it ſeemeth hard to tender it when the plaintiff was abſent; and to compel him to attend all the month was not reaſonable: but by WRAY, it is more reaſonable that the laſt day ſhall be for one to tender, and the other to receive; but they were in doubt of this caſe.

But CLENCH ſaid, if one be obliged to pay another 10 l. at *Michaelmas*, or within ten days after, and no place is limited for payment, then if the obligor meet the obligee within the ten days, and doth tender the 10 l. the obligation is ſaved; for perhaps at the laſt day he cannot find him. And the Juſtices held, in this caſe, the defendant need not plead *tout temps priſt*, for this ſum cannot be intended parcel of the ſum contained in the obligation; for peradventure more ſhall be paid during the life of the *feme*, than the ſum in the obligation doth amount unto. But afterward it was adjudged for the plaintiff.

Morris *againſt* Kirke.

CASE 34.

ASSUMPSIT. And declares, that whereas he had expended divers ſums of money for the defendant, amounting to 25 l. the defendant promiſed to pay him all the ſums of money which he had

In *aſſumpſit* for money expended, the day and place of the re-

queſt is iſſuable, and muſt be averred in the declaration. Qu. See 2. Term Rep. 29. 132. 177. 229.

Poſt. 78. 85. 91,

Morse *against* Lawes.

had expended for him, and alledgeth that *licèt ſæpiùs requiſitus*, the defendant had not paid, &c. Upon *non aſſumpſit*, it was found for the plaintiff. And it was now alledged in arreſt of judgment, that the plaintiff ought to have alledged the day and place of the requeſt, for it is iſſuable; and it is not like to a common action upon the caſe where a duty is due, for there it is payable without requeſt, and it is in nature of an action of debt; but here an action is only maintainable upon the promiſe, and is not payable without an expreſs requeſt, and ſhewing what is due. And ſo it was adjudged.

Case 53.

Preſton *againſt* Tooley.

Trinity Term, 29. *Eliz. Roll* 768.

Delivering a bond to and at the requeſt of the defendant, to inſpect and ſafely keep, is a ſufficient conſideration for his promiſe to pay a certain ſum if he did not redeliver it to the plaintiff within a limited time.

Ante 67. 70. 1. Saund. 33. Cowp. 290.

ERROR upon a judgment in an *aſſumpſit*, brought in the common bench, *Paſ.* 28. *Rot.* 927.—The caſe upon the record was, *Tooley* brought an *aſſumpſit* againſt *Preſton*, and declared, that whereas *John Gibbons* by his writing obligatory, ſealed with his ſeal, 26. *Eliz.* "*in formâ et naturâ ſcripti obligator' ſive recognitionis* "*ſecundùm formam ſtatuti ſtapulæ apud Weſtmonaſterium, de debitis* "*pro merchandiſis in eâdem emptis recuperand' ordinat' et provis' debito* "*modo confect' coram* CHRISTOPHORO WRAY, *capit' juſticiario, &c.* "*recognovit et conceſſit ſe teneri in mille libris, &c. juxta formam dicti* "*ſtatuti, &c.*" And that afterwards upon 28. *March*, 27. *Eliz.* at *London*, at the requeſt and inſtance of the defendant, he had delivered the ſaid writing obligatory to him, *ad inſpiciendum*, and ſafely to keep and redeliver to the plaintiff within ſix days after; and that the defendant, in conſideration thereof, did then aſſume to him, that if he did not redeliver it within the ſaid time, that he would pay him when required 1000 l. and alledgeth, that *licèt* the defendant had not redelivered the ſaid written obligatory within the ſaid ſix days after the ſaid delivery, and *licèt* the ſaid plaintiff after the ſaid ſix days paſſed, *viz.* at ſuch a day and place required the ſaid *Preſton* to pay the ſaid 1000 l. according to his promiſe; he had not paid, and refuſed to pay, to his damages of 1000 l. The defendant did demur in law; and for cauſe ſhewed that there was no ſufficient conſideration to charge him. But after divers arguments it was adjudged a good conſideration to charge him, and thereupon a writ of enquiry of damages was awarded, upon which it was found, that by the non performance of the promiſe, the plaintiff ſuſtained damages 200 l. and for coſts of ſuit, 53 s. 4 d. which were accordingly adjudged to him; and 17 l. 6 s. and 8 d. more for coſts.

The form in which a bond in the nature of a *ſtatute ſtaple* may be pleaded.

5. Com. Dig. 499.

UPON all this matter a writ of error was brought. Firſt error aſſigned was, that the ſaid ſtatute was merely void; for it is alledged to be a ſtatute ſtaple, according to the ſtatute for the recovery of debts made at *Weſtminſter*, *&c.* whereas it is a mere ſtatute ſtaple which is to be acknowledged before the mayor, &c. according to the 27. *Edw.* 3. c. 8. (*a*) and not before any other; and this is acknowledged before WRAY, C. J. *Sed non allocatur*, for it was held clearly to be well enough alledged, for it is a ſtatute ſtaple acknowledged according to the 23. *Hen.* 8. c. 6. and it is pleaded according to the uſual courſe of pleading ſuch ſtatutes.

In *aſſumpſit*, it is not neceſſary to alledge *the time* of delivery.

Second error, that there was no time certain alledged, when he delivered the ſtatute to the defendant; but only it is alledged,

(*a*) See alſo, 11. Edw. 1. de Acton Burnel, and 13. Edw. 1. de Mercatoribus.

that at ſuch a day he was poſſeſſed of the ſtatute, and delivered it to the defendant at his inſtance and requeſt. *Sed non allocatur*; but I did not hear their reaſon.

PAXTON *againſt* TOOLEY.

Third error out of the record, that the plaintiff *quarto die obtulit ſe* againſt the defendant *per attornatum ſuum*, but ſhewed not who was his attorney, and if he had no attorney it was error. CURIA *contra*, becauſe it is not the courſe of the common bench, to enter the name of the attorney till after the declaration; and in the declaration it is ſaid that he appeared *per* THO. WARREN, *attornatum ſuum*. But EGERTON ſhewed a precedent where the entry was, that one appeared by — CUTTING, *attornatum ſuum*, and ſhewed not his chriſtian name; and this being alledged in error, the judgment was reverſed, which the Court here did agree; for where he meddleth with his name, he ought to name him truly by both names.

An appearance may be filed in C. B. without naming the attorney. Ante 59. Poſt. 153. 545. Dougl. 115.

Fourth error, which was not put in the record, that it was alledged, *licèt* he had not delivered it within ſix days, &c. ſo he doth not preciſely affirm it.—CURIA *contra*; for it is a good affirmation, as *Buckley's Caſe* in the Commentaries.

Fifth error, that the conſideration was not ſufficient, for it appeareth not that the defendant had any benefit by the ſhewing it to him, but rather charge and trouble to keep it, and to look on it. But as to this the Court would hear no arguments, for they held it clearly a good conſideration; and this was the point diſputed in the common bench, and therefore they commanded the judgment ſhould be affirmed.

What is a ſufficient affirmation. 2. Term Rep. 28. 45.

But EGERTON, *ſolicitor*, moved that the judgment might be ſtayed for another day; and then moved another error, that upon the writ to enquire of damages, the plaintiff had no day given him in court, and no day was given to the defendant then to appear, and vouched 8. *Hen.* 7. *Roll* 29. *Bk. of Ent.* 273. where the error was aſſigned, and admitted good; and this he ſaid was a manifeſt error, and the Court ſaid they would adviſe of it; but afterward the next day it was moved again, and this error overruled; for they ſaid the courſe of the common bench was to give no day. But all the precedents in this court are otherwiſe, and the death of the party plaintiff abateth the writ (*a*). And the judgment was affirmed.

A writ of enquiry held good, though no day was given to the parties. Poſt. 144. Yelv. 97. 11. Co. 6. b.

(*a*) Sed vide 8. & 9. Will. 3. c. 10.

The Mayor of Lawnſon's Caſe.

CASE 36.

TRESPASS againſt him for taking a quarter of corn. He juſtified for that it was within the town of *Lawnſon*, and it was damage feaſant in his freehold. The plaintiff replies, that they were by *charter* in the time of queen *Mary* incorporate, &c. and a market was granted to them, and the place where, &c. was appointed for the market-place, and he brought his corn on the market-day, and ſet it there, and the defendant took it: and upon demurrer, it was adjudged without argument, that upon this matter the mayor could not juſtify the taking.

Dinham

A mayor cannot juſtify taking corn *damage feaſant* from the market-place. Poſt. 117. 628. 10. Co. 94. 2. Ld. Raym. 1590. Cowp. 661. 1. Term Rep. 660. 2. Stra. 1238.

CASE 37.

Dinham *againſt* Beckett.

Quere, Whether a defendant who juſtifies a treſpaſs by *ſpecial title* muſt give *colour* to the plaintiff? 10. Co. 89. b. 90. a.

TRESPASS for breaking his cloſe. Defendant pleads that *J. S.* was ſeiſed of the land and let it to *J. D.* and he as his *ſervant* entered, and gave no colour to the plaintiff; and for that cauſe the plaintiff demurred. And it was argued by GRIFFITH of the one part, and by SHIRLEY on the other part.

GRIFFITH ſaid, that when the defendant doth make a ſpecial title to himſelf or to any other, he ought of neceſſity to give colour to the plaintiff; but when he pleads a general plea, or that it is his freehold, it is otherwiſe. 2. *Edw.* 4. *pl.* 8.

SHIRLEY *contra*, becauſe the defendant doth make no title to himſelf, but doth juſtify as a ſervant. 18. *Edw.* 4. *pl.* 3.

WRAY, C. J. ſaid he ought to give colour, though he juſtified as a ſervant, but moved the parties to relinquiſh their demurrer, and plead to iſſue, which they did.

CASE 38.

Gabriel Widow *againſt* Peter Clerke.

A mayor, who is both judge and ſheriff, is bound to take ſufficient bail; but a *qui tam* action for refuſing it; muſt be by information or original writ, and not by bill. Poſt. 544. 3. Inſt. 104. 1. Roll. Ab. 537. Mour. 247. Cro. Car. 138. 3. Leon. 237. Wm Jones, 193. 3. Burr. 1615. Strange, 479. 2. Hawk. 148. 380, 381. Dyer, 332. 1. Sid. 305. ſed vide Douglas, 381. n. 22. and Milward v. Thatcher, 2. Term Rep. 81. 2. Morgan's Vade Mecum, 291.

BILL OF DEBT for 40l. upon the 23. *Hen.* 6. c. 9. brought by the plaintiff, *tam pro ſe, quàm pro dominâ reginâ*. And declared, that whereas *Anthoney Wolley*, 27. *Eliz.* had ſued in the court of *Nottingham*, before the ſaid defendant, then mayor, and *J. S.* and *J. D.* ſheriffs there, according to the cuſtom of the ſaid town, a plaint of treſpaſs *ſur caſe* againſt *Anthoney* the plaintiff, upon which a *capias* was awarded by them to *O. B.* ſerjeant and officer of the ſaid court, to take the ſaid plaintiff, and have his body before them at the next court, *viz.* 1. *Septembris*, to anſwer, &c. and that afterward, *viz.* 23. *Auguſt*, 27. *Eliz.* the ſaid *O. B.* arreſted him, and that he committed him to the priſon of *Nottingham*, under the cuſtody of the ſaid *Peter Clerke*, mayor of the ſaid town, and keeper of the queen's gaol there; and alledged further, that he being then in priſon, 28. *Auguſt*, 27. *Eliz.* did offer to the ſaid mayor, keeper of the ſaid gaol, ſureties, &c. to appear at the next court, to anſwer to the ſaid *Anthoney Walley* in the ſaid action, which ſureties he then refuſed, and kept him in priſon until, &c. againſt the form of the ſaid ſtatute, *per quod actio accrevit*.

The defendant pleads *nihil debet*, and found againſt him; and this term it was moved in arreſt of judgment, that the action lieth not againſt the mayor, for the ſureties were not to be offered unto him but to the ſerjeant; for the mayor was the judge to award the proceſs, and cannot be an officer to himſelf to take the bail. Alſo the warrant is, that he ſhall take his body and keep him till the next court, *viz.* 1. *Septemb.* and ſo till that day is come he is in the cuſtody of the ſerjeant, in whatſoever priſon he is committed. Alſo the ſurety offered is not according to the ſtatute, for it is that he ſhall appear *ad reſpondendum*, whereas it is to be only for his appearance, and not for his anſwer.

Sed non allocantur, for it was held clearly that the plaintiff is to recover, for the ſerjeant is but the inferior officer; and although the mayor is judge in ſome reſpects, yet he may be an officer for keeping the gaol; and here he is not only the judge, but the ſheriff alſo, and the plaintiff being in priſon under him, it is proper

Poſt. 168. Cro. Car. 138. 196. Cro. Jac. 94. 10. Co. 101. b.

proper to offer ſureties to him; and ſo is the common courſe in *London*, upon plaint before the ſheriffs, and a precept to the ſerjeant to arreſt one, the ſureties ſhall be found and offered to the ſheriffs. 9. *Hen.* 6. *pl.* 19. And when the party is brought to the gaol he is under the mayor's cuſtody, and not of the ſerjeants (*a*). And they held clearly that the ſurety offered was according to the ſtatute, and commanded judgment to be entered accordingly, but it was ſtayed till the next day.

Widow against Clerke.

(*a*) See 1. Bac. Abr. 208. in notis.

Walmsley, *ſerjeant*, then ſaid, that the action is not well brought; for the 18. *Eliz.* c. 5. is, that no action ſhall be brought but by information or original action, and not otherwiſe, and this is by bill of debt.

Coke.—This action, in this court, is the proper original action that is ſued in this court, and ſo is within the intent of the 2. *Rich.* 3. c. 17. & 27. *Hen.* 6. c. 5. Alſo the 18. *Eliz.* c. 5. is to redreſs diſorders in common informers, but here he that ſueth is the party grieved. But the Court held it will be hard to maintain this action to be ſued here, for the ſtatute is in the negative, that it ſhall not be ſued otherwiſe, which doth not refer to any perſon; but they would adviſe.

Poſt. 544. 1. Roll. Ab. 357. 3. Inſt. 194. Moor, 412. 6. Co. 19. b. 1. Com. Dig. 319.

Daniel ſaid he was of counſel with the gaoler of *Boſtin* in a bill brought againſt him in this court, and it was abated for this cauſe, that it was not by information.

Afterward, *Ter. Paſch.* it was for this cauſe only adjudged for the defendant; and it cannot be helped by the 18. *Eliz.* c. 14. for jeofaile, for this is not matter of form but ſubſtance, by miſconceiving the action.

Hector Nunns, Doctor of Phyſic, *againſt* Gee.

Case 39.

Eaſter Term, 29. *Eliz.* *Roll* 498.

Breach of a covenant.

COVENANT. And declareth, that whereas the queen by her letters patent granted licence to him, his deputies and aſſigns, to buy *Spaniſh* wool, and to tranſport it hither, &c. he by this indenture bearing date, &c. granted to the defendant, and to *Reger Norwood*, the ſaid licence for eight years, with divers covenants to enjoy it; in conſideration whereof the ſaid defendant did covenant and grant to him, to pay to him 100l. every year at two feaſts, *viz.* the *Annunciation* and *Michaelmas*; and further, that every year at the feaſt of the *Annunciation*, or within twenty days after, he would make a new obligation of 150l. for the payment of the ſaid 100l. the next year; and alledges in fact that the defendant had not paid him the 50l. due to him at *Michaelmas* 28. *Eliz.* and that he did not make an obligation at the *Annunciation*, &c. and for thoſe covenants broken he brought the action.

1. Wood's Con. 396. Cow. 219. 1. Term Rep. 229.

The defendant pleaded, that in the indenture there is contained, "proviso semper, that if the defendant doth not every year "make the obligation at the feaſt of the *Annunciation*, or failed of "payment of the money at the day, that then and from thenceforth the ſaid indenture, and every clauſe, article, and ſentence "therein ſhould be void, and of none effect;" and ſhewed that he failed in making the obligation at the firſt day, and ſo the indenture is void, and demands judgment, *ſi actio*. Upon this it was demurred in law.

Owen

Nunns *against* Gee.

OWEN and WOOD argued that the action did lie, for this covenant was broken before the indenture became void, and therefore it is not reason but the action should well lie; but they agreed that for the covenant for payment of the money no action did lie, because the indenture was void half a year before, by not making the obligation; and the indenture is, that "then and thenceforth "the indenture should be void," and so for all the time before he remaineth chargeable; as in case of lease for years, and for rendering rent, and for non payment, the lease to be void; although the lease becomes void, yet for rent due before debt lieth: so upon the statute of 13. *Eliz.* c. 20. of leases made by parsons, that upon *non-residency* for eighty days (*a*), the lease shall be void, and that all obligations, covenants, &c. for enjoyment of it shall be void, yet it was adjudged, 26. *Eliz.* in *Walls and Cox*, that where a parson made such a lease by indenture, in which were divers covenants on the lessee's part, and after the lease, &c. became void by *non-residency*, &c. that for a covenant broke before, an action of covenant did lie.

Post. 916.

(*a*) See also 14. Eliz. c. 11. & 18. Eliz. c. 11. Post. 245.

WRAY, C. J. said, the cases are not alike; for in that case the covenant was plainly broken, and the lease and covenants after became void; but here the thing that makes the indenture void, is the breaking of the covenant, so they are both at one time, and so he hath lost all his bargain, and all his benefit of the indenture, and the other party is at large, and so no priority here. But they would advise.—In *Trinity Term* following, it was adjudged for the plaintiff; but I heard not their reasons: but it was said that the reason was, that the intent of the party was, that it should be void only to have benefit of covenants broken *in futuro*, but for the covenants broken before it was never their intent, but that the party should have advantage of them.

Post. 600.

CASE 40.

Simmons *against* Sweete.

A magistrate may bind to good behaviour a person who abuses him, but he cannot imprison except while in the duties of his office.

FALSE IMPRISONMENT. The defendant justified, because the plaintiff said to *J. S.* that the mayor of *Barstable* was *a fool*, which the mayor hearing of, commanded the defendant, being an officer, &c. to imprison him. Upon demurrer it was adjudged no plea, but for such words he might have bound him to his good behaviour, but was not to imprison him; yet if the mayor had been in public place of justice, and he had called him by such opprobrious words, he might imprison him.

Post. 685. Moor, 247. 11. Co. 98. 2. Roll. Ab. 78. 1. Haw. 89. 261. 2. Salk. 697. 1. Strange, 560. 3. Com. Dig. 488. 4. Bac. Abr. 698. Wood's Inst. 417. 2. Ld. Raym. 1029.

CASE 41.

Hubbard's Case.

In trover *the place* of conversion must be alledged.

ACTION for trover and conversion, and doth not alledge a place of conversion, which is a thing material, and being alledged in arrest of judgment, the bill was abated.

Ante 74. Post. 98. Cro. Car. 262. Bull. N. P. 46. 5. Com. Dig. 30.

Bland

Bland *against* Maddox.

Case 42.

PROHIBITION. It was agreed clearly that a layman may be prefented to a prebend, for *non habet curam animarum*; and COKE faid, all the poffeffions of prebends were at firft the bifhops, 7. *Edw.* 3. *pl.* 5. 30. *Edw.* 3. *pl.* 26. and *de mero jure* do pertain to the bifhops (*a*).

A layman may be prefented to a prebendary. 2. Roll. Ab. 341. 3. Co. 75. b. Moor, 261. 2. Vin. Ab. 5. 3. Inft. 155.

(*a*) See 3. Jac. 1. c. 11.

Carter *againft* Goddard.

Case 43.

ERROR. The cafe was, *Goddard* brought an *aſſumpſit*, and his writ was, in conſideration that he would procure *J. S.* to aſſign to *Carter* ſuch a term in certain lands, that he would pay him 40l. and alledged that he at his procurement had aſſigned, &c. but in the declaration it was not alledged that he had aſſigned the term, &c. and ſo no conſideration; and this was aſſigned for error.

COKE prayed it might be amended; for when the clerk had the writ before him, which was good, and would not purſue it, but leave out a thing compriſed in the writ, which he had before him for his information, this is amendable, 13. *Hen.* 7. *pl.* 21. 11. *Edw.* 4. *pl.* 2.

The opinion of the Court was, that it ſhould be amended for that cauſe; and they ſaid, ſo was the opinion of the Juſtices of the common bench.

A declaration may be amended by the writ. Poſt. 119. 170. 435. 8. Co. 150. a. 1. Com. Dig. 328. Cowp. 407. 425. Dougl. 114. 1. Term Rep. 782.

King *againſt* Robinſon.

Case 44.

Eaſter Term, 29. Eliz. Roll 90.

ASSUMPSIT. The plaintiff declared, that the defendant did aſſume to do ſuch a thing, &c. and upon *non aſſumpſit* it was found he did aſſume to do that *and another*, which he had not performed. It was reſolved againſt the plaintiff: for the Juſtices ſaid, where the plaintiff declareth that in conſideration of one thing, the defendant aſſumed, &c. and the jury find in conſideration of that and another thing he aſſumed, he had failed of his *aſſumpſit*; and the Juſtices denied the caſe of 32. *Hen.* 8. *Bro.* "*Verdit.*"

NOTA. It was ſaid that *Paſ.* 14. *Eliz.* CATLIN did cauſe a record of *Paſ.* 21. *Hen.* 7. to be read in the queen's bench, of a judgment given before FINEUX, C. J. And the caſe was, a woman in *London* had given to the plaintiff flattering words *æquipollentia* to a promiſe of marriage, and by that means he delivered to her money and other things, and ſhe had cauſed the plaintiff to retain counſel for her, and to travel about her ſuits in *chancery*, and afterwards the woman refuſed to marry him, and married another, in deceit and fraud of the plaintiff: the woman traverſed all the matters alledged againſt her, and part was found for the plaintiff, and part againſt him; and this was one matter found for him, that the woman had given unto him *blanda verba matrimonio æquipollentia*; and the plaintiff had judgment for thoſe particulars that were

In *aſſumpſit* if the jury find that the defendant did undertake to perform the promiſe laid in the declaration *and another*, the plaintiff cannot recover. Ante 41. Poſt. 147. 149. 660. Cro. Jac. 504. Bull. N. P. 147. 1. Salk. 438. Cowp. 766. 1. Term Rep. 447.

KING *against* ROBINSON.

were found for him, and he was amerced for the other; and this was an action upon the case, for the deceit in not marrying him; for he did not declare of any promise of marriage in fact. And CATLIN said it was to be noted, that the plaintiff had judgment, although but part found for him, and part against him, which is contrary to that (as he said) that hath been ruled here twice or thrice, That if an *assumpsit* be brought upon several things, and part only is found for him, the plaintiff shall have no judgment for any part. But SOUTHCOTE said, that the record shewn was an action for divers deceits; which being traversed, and part found for the plaintiff, and part against him, yet judgment may be given for the plaintiff, for the part, &c. but of an entire promise it is otherwise (*a*), for there failing in part, he fails in all.

4. Vent. 151. (*a*) 1. Term Rep. 133. 240. 226.

CASE 45.

Bonifaut *against* Sir Richard Greenfield.

Land devised to several executors in fee, to the intent that they should dispose of it, may be sold by any of them if the others refuse to execute the authority. Ante 26.

THE case was, *Tremain* seised of the manor of *D.* devised the same to *J. S.* and three others, and to their heirs, to the intent and purpose that the devisees should set it for the best profit, and convert the money thereof coming, to the performance of his will; and in the conclusion of the will he maketh them four his executors, and dieth. One of the four refuses to meddle with the will or sale; and the other three sell the land in the life of the fourth; the question was, If the sale was good?

Co. Lit. 113. a. Godb. 77.

The case was argued by POPHAM and EGERTON; and it was adjudged that the sale was good by the three, either by the common law, or by the 21. *Hen.* 8. c. 4. for when he deviseth the land to four to sell, &c. and afterwards maketh them his executors, this doth *tant amount* as if at the first he had devised, that such his executors should sell; and in such a case at the common law, the sale by three, the fourth refusing, was good; for they three may perform the will without the fourth; but the statute maketh it clear.

5 Mod. 436
11 Mod. 209

Michaelmas Term,

29. and 30. Eliz. In the Exchequer.

Sir Roger Manwood, *Knt.* *Chief Baron.*
Edward Flowerdew, *Esq.*
Thomas Gent, *Esq.* } *Barons.*

The Queen *againſt* Blaucher.

CASE 1.

THE queſtion was, If upon a traverſe to the certificate of the *Biſhop of Lincoln* for non payment of tenths upon demand, nor within forty days after, whether the benefice be void by the 26. *Hen.* 8. c. 3. that enacts, that after ſuch default, and certificate thereof made to the court under the ſeal of the biſhop, that it ſhall be void?

Tenths are to be paid at the parſonage, and a perſon authoriſed by the biſhop muſt demand them, otherwiſe the certificate is traverſable. Poſt. 395.

MANWOOD, *Chief Baron*, ſaid, it hath been a great queſtion if this certificate of the biſhop be peremptory, or that the party ſhall be admitted to his traverſe of it. And upon great deliberation between the Barons, and by the advice of the other Juſtices, it hath been clearly held that the certificate is not peremptory, for the biſhop doth it only as an officer, *ſcilicet*, as collector of the tenths, and not as a judge, as in the caſe of baſtardy. And here is to be a default in the parſon, *viz.* non payment, which is triable *per pais*; for otherwiſe all the parſons of *England* may be put out of their parſonages by ſuch *nude ſurmiſe*, and bare certificate without any anſwer; and the law never intended to make the certificate ſo peremptory.

Moor, 541. 915. 2. Inſt. 628. Savil. 1. 26. 1. Bl. Com. 285.

BARON GENT ſaid, he had known it ſo ruled in his experience upon an iſſue, upon avoidance or non avoidance, upon that ſtatute in a *quare impedit*.

And all the Barons held, in the principal caſe, that the officer of the biſhop, who is to demand the tenths, ought alſo to be authoriſed to receive them; for he cannot appoint them to be paid at another place, or to another perſon; for the parſon is to pay them at his own houſe, and to the perſon that demands them in the name of the biſhop: and they ſaid it had been ſo formerly ruled (*a*).

(*a*) By the ſtatute 2. & 3. Ann. c. 11. all the revenue of firſt-fruits and tenths is veſted in truſtees, to form a fund for the augmentation of poor livings.—By 5. Ann. c. 24. and 6. Ann. c. 27. benefices under 50l. a year are diſcharged from the payment of theſe tributes; and the collection of them is further regulated by 1. Geo. 1. ſt. 2. c. 10. and 3. Geo. 1. c. 10.

Hilary Term,

30. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1. Arthur Robſert *againſt* Andrews, Ann his Wife, and Cocket.

Trinity Term, 22. Eliz. Roll 583.

If a perſon receives money by the hands of a ſervant for the relief of others, he may be charged as having ſo received it, in an action of account, tho' no agreement was made that he ſhould account; and if he does not appear after judgment *quod computet*, a *capias ad computandum* lies; and the error of awarding it to a different county than where the action is brought, is helped by the ſtatutes of *jeofails*. The plaintiff may deny that he has expended the money for their uſe, without ſaying *or any part*; and (if the defendant interpleads) *he* ſhall have judgment to recover damages and coſts; but he cannot alledge *diminution* after *in nullo eſt erratum* to the want of an original; but then this error muſt not be aſſigned *hors de record*.

ERROR of judgment in the common bench, in an account which is entered there, *Term. Paſch. Rot.* 940. where *Andrews* and his wife and *Cocket* declared againſt the ſaid *Arthur Robſert*, that he on the 20th of *Auguſt*, 10. *Eliz. apud Filly, in com. Norf.* was the receiver of the money of the ſaid *Cocket* and *Ann, dum ſola fuit, viz.* by the hands of *Jo. Waſe*, 100l. to render an account when he ſhould be required; yet the defendant being required to do it had refuſed, to their damages 200l.

The defendant pleads that he was never their receiver of the ſaid 100l. or of any parcel of it, by the hands of the ſaid *Jo. Waſe*, to render an account, &c.

Upon this they were at iſſue; and it was found by ſpecial verdict that the 10th *Aug.* 10. *Eliz.* one *Oſbert Munford* gave the ſaid 100l. for the relief of the ſaid *Cocket* and *Ann*, and delivered the ſame to the ſaid *Jo. Waſe*, then his ſervant, to the intent he ſhould deliver it to the ſaid *Arthur Robſert*, for the relief of the ſaid *Ann* and *Cocket*; and that he the ſaid 20th *Aug.* 10. *Eliz.* did deliver it to the ſaid *Arthur Robſert*, for the relief of the ſaid *Ann* and *Cocket*, according to the ſaid intent; and if upon the whole matter *Arthur Robſert* ſhall be ſaid to be the receiver of their money by the hand of the ſaid *Jo. Waſe, prout, &c.* they prayed the diſcretion of the Court. It was adjudged he ſhall be ſaid to be their receiver, *prout, &c.* and that he ſhall account with the ſaid then plaintiffs for the ſaid 100l.

Afterwards by virtue of a writ of *capias ad computandum*, directed to the ſheriffs of *London*, the ſaid *Arthur Robſert* was taken and brought to the bar, and committed to THE FLEET, *quouſque, &c.* and afterwards auditors were aſſigned to him by the Court to hear his account, and he found mainpernors in 200l. to enter into account before them and to finiſh it, &c. and to appear in court *de die in diem* until judgment was given thereupon, and to

ſatisfy

ſatisfy all the arrearages which by the Court he ſhould be adjudged to ſatisfy, or to render his body to priſon until he had ſatisfied. And hereupon he entered into account, and alledges, that he had maintained the ſaid *Ann dum ſola fuit* (who afterwards intermarried with *Andrews)* and the ſaid *Cocket* by the ſpace of eight years, at *D.* in the county of *M.* and had expended the ſaid one hundred pounds for the relief of the ſaid *Ann* and *Cocket*; and ſo prayed to be diſcharged. Upon this they were at iſſue, that he had not expended the ſaid 100 l. for the relief, &c. and it was found for the plaintiffs, and damages aſſeſſed above the ſaid 100 l. *ratione interplacitationis competi prædict'* twenty pounds, and coſts ten pounds. Upon this verdict, judgment was given for the then plaintiffs, and the coſts were increaſed by the Court; and upon this judgment *Arthur Robſert* brought a writ of error. ROBERT *againſt* ANDREWS, &c.

FENNER, *ſerjeant, for the plaintiff*, aſſigned divers errors.—FIRST ERROR, The matter in law, which was adjudged in the common bench, *viz.* that they declared he was their receiver to render an account of the 100 l. whereas it was found he received the money for their relief, and not to account.—But THE COURT held clearly, that when he received the money in that manner, he received it to their uſe; and is accountable, if he did not expend it; and it is as if he had received it to their uſe by expreſs words.

SECOND ERROR, That they declared he was their receiver *ad computandum*; and he is not accountable unleſs he did not expend it in their maintenance; and ſo ought to have a ſpecial writ, and declared ſpecially. *Sed non allocatur*; for they to whoſe uſe the bailment was made can have no other writ; for they cannot ſuppoſe he received it *ad merchandiſandum*, for that is falſe, and he had no ſuch authority; and in that caſe his coſts were to be allowed him. Poſt. 806. 1. Leon. 87

THIRD ERROR, That in the writ and count he is ſuppoſed to be receiver of their money by the hands of *Jo. Waſe*, whereas it ought to be by the hands of *Oſbert Munford*; for *Waſe* delivered it as his ſervant, and it may be ſaid the delivery of the maſter; and by the hand of the maſter the receipt ought to be ſuppoſed. —COKE anſwered, that whereas the ſervant doth contract, this ſhall be ſaid to be the contract of the maſter, and he only charged for it, 11. *Edw.* 4. *pl.* 6. But here they convey only a poſſeſſion by the hands of *Waſe*, but conveyed no intereſt by him; and therefore may count that he received it by his hands. Poſt. 614. 3. Bl. Com. 163.

FOURTH ERROR, For that the writ was, and they accounted that he was their receiver, to render an account when required; which is falſe, for no requeſt was mentioned upon the delivery.—COKE. The law implieth it, 21. *Edw.* 4. 42..

FIFTH ERROR, The writ of account was brought in *Norfolk*, and the *cap' ad computandum* was awarded to *London*; whereas it ought to have been to the ſheriff of the county where the action was brought.—COKE ſaid it was helped by the ſtatute of *jeofailes*; and he appeared upon this proceſs, and ſo had made it good; and error in proceſs cannot be alledged after *in nullo eſt erratum* pleaded; for if it had been alledged, the other party might have alledged diminution.

ROBERT *against* ANDREWS, &c.

SIXTH ERROR, For that before the auditors, the defendant alledged, that he had expended the 100 l. for the relief of the plaintiffs; and they replied, that he had not expended the 100 l. but ſaid not, nor any part; for if he had expended any part, it is not reaſon he ſhould give an account of that part; and judgment given upon an ill iſſue is erroneous.—COKE. That inaſmuch as it is a collateral iſſue, he is only to join with his adverſary, and is to add nothing to it; but in a general iſſue it is otherwiſe: as in an action of waſte for cutting twenty oaks, the defendant ought to plead, that he did not cut the ſaid twenty or any of them; but in debt upon an obligation, that he ſhall do no waſte: and the breach is aſſigned that he cut twenty oaks, it is ſufficient to plead he did not cut the ſaid twenty oaks, *modo et formâ, &c.* 2. *Mar. Dyer.* 115.

A general charge ought to be anſwered in every part, but it is ſufficient to anſwer a collateral iſſue in the words of the plaintiff. Ld. Ray. 42. 5. Com. Dig 89. Co. Lit. 282. a.

SEVENTH ERROR, It doth not appear to the Court that there was an original writ, for it is not certified; and the defendant hath pleaded *in nullo eſt erratum*; and therefore cannot alledge diminution, 20. *Edw.* 3. *Error* 2. 9. *Edw.* 4. 32. and judgment given where there is no original is erroneous.—COKE. If the plaintiff aſſigneth for error that there is no original, and the defendant pleads *in nullo eſt erratum*, he cannot after alledge diminution; but this error being aſſigned *hors de record*, the Court here may write to the common bench to certify it; for by the writ of error, all is certified which is with the chief juſtice there, which is only the body of the record; but the original and judicial writs remain with the *cuſtos brevium* and other officers; which are never certified but where error is aſſigned for want of them.

A writ of error removes the record only, and not the writs. Poſt. 153. 155. 271. 281. 837. 1. Leon. 22. Cro. Jac. 479. 1. Roll Ab. 790. Bridg. 57. Cowp. 843.

EIGHTH ERROR, That the plaintiff had judgment to recover damages and coſts, and it is a poſitive law, he ſhall have none in a writ of account; as 2. *Ric.* 2. & 14. *E.* 3. *Damages.* And although there is a precedent in the *Book of Entries*, where in an account damages were given, the reaſon is, becauſe the goods were delivered *ad merchandiſandum*, and to have increaſe; but it is not ſo in this caſe. But it was anſwered, that in the firſt judgment to have an account, damages ſhall not be recovered; but here damages are not given *ratione detentionis compoti*, but *ratione interplacitationis compoti*, where the plaintiffs are delayed by the defendant's plea: and although goods are given to merchandiſe, yet he ſhall not recover damages for the detainer, but all ſhall be put in the arrears of the account. And in the old MAGNA CHARTA it is ſhewn in what writs damages ſhall be adjudged, and a writ of account is one of them. And in the *Book of Entries*, fol. 17. damages are given in account. Afterwards, notwithſtanding theſe errors, the judgment was affirmed.

Damages and coſts may be given in an action of account. 1. Roll. Ab. 125. 3. Wilſ. 117.

By 4. Ann. c. 16. an action of account is given againſt the executors and adminiſtrators; but the moſt ready and effectual way to ſettle theſe matters of account is by bill in the court of equity; and therefore actions to compell a man to bring in and ſettle his account, are now ſeldom uſed.

CASE 2.

Crow's Caſe.

Judgment in battery reverſed for want of the *quod capiatur*. Poph. 203.

ERROR of a judgment in treſpaſs of aſſault and battery, becauſe the judgment was *quòd ſit in miſericordiâ*, whereas it ſhould

Poſt. 107. 5. Co. 39. b. 8. Co. 59. a. Cro. Jac. 224. Savil. 37. 5. Com Dig. 179. 2. Saund. 47.

be

be *quòd capiatur* (*a*). TANFIELD moved, that this is for the plaintiff's benefit, and is the default of the clerk, and ſo ſhall not be aſſigned for error; but the judgment for that cauſe was reverſed. 29. *Edw.* 3. *pl.* 29. 14. *Eliz. Dyer*, 315. Crow's Case.

(*a*) By 5 & 6. Will. & Mary, c. 12. no writ of *capias* ſhall iſſue for the fine to the king; but the plaintiff ſhall pay 6s. 8d. and be allowed it againſt the defendant among his other coſts; and therefore in C. B. they now enter that the fine is remitted; and in B. R. no notice is taken of any fine or *capias* at all.—3. Bl. Com. 399. Carth. 390. Salk. 54.

Levellin *againſt* Watkins. Case 3.

ERROR to reverſe an *outlawry*, becauſe the original was againſt *Levellin*, with a ſingle *L*, and all the meſne proceſs was *verſus Llevellin*, with a double *Ll.* And the proceſs was againſt two, and the ſheriff returned, "*quòd non ſunt inventi*," and doth not ſay, "*nec* "*eorum aliquis.*" And the judgment was for theſe cauſes reverſed. Outlawry reverſed. Poſt. 104. 198. 248.

Griſling *againſt* Wood. Case 4.

ERROR, for that in an action in an inferior court, the declaration was in *Engliſh*, whereas by the 36. *Edw* 3. c. 15. all entries are to be in *Latin*: and although it was ſaid the cuſtom there was ſo uſed, yet this cannot be good againſt a ſtatute, and the judgment was reverſed. And EVENS ſaid, that divers indictments had been diſcharged for this cauſe (*a*). Cuſtom cannot prevail againſt poſitive law. Poſt. 185. Ca. tem. Hard. 7. Dougl. 204. 3. Ter. Rep. 271.

(*a*) By 4. Geo. 2. c. 26. and 5. Geo. 2. c. 27. all proceedings are to be in Engliſh.

Devenly *againſt* Ann Welbore. Case 5.

ASSUMPSIT againſt the defendant as executrix of *George Welbore*. And declareth, that in conſideration that the plaintiff would aſſure certain lands to *Thomas Percy* at the inſtance of the ſaid *George*, he aſſumed, that if *Thomas Percy* did not pay him yearly upon requeſt ten pounds, and ten load of faggots, that he would pay them (*a*); and alledgeth *in facto*, that he did aſſure the land, &c. to the ſaid *Thomas Percy*; and that the ſaid *Thomas Percy*, *licèt ſæpiùs requiſitus*, did not pay the ſaid ten pounds, and ten loads of faggots; nor the ſaid *George* in his life, nor the defendant ſince his death. Upon *non aſſumpſit*, it was found for the plaintiff.—COKE moved in arreſt of judgment, that the declaration was not good; for the payment of the ten pounds, &c. was to be upon requeſt, and a requeſt is material, for otherwiſe the defendant is not chargeable; and therefore the requeſt, and the time and place where, ought to be expreſly alledged: and of that opinion was the Court, and judgment given, that the plaintiff *nihil cap' per billam.* Where a premiſe is to be performed at the requeſt of the plaintiff, the requeſt, and the time and place where it was made, muſt be expreſly alledged. Ante 74. Lut. 231. Owen, 109. 1. Saund. 33. 1. Brownl. 10. Jones, 56. 85. Sav. 72.

(*a*) See 29. Car. 2. c. 3.

Case 6.

Wikes *against* Morefoots.

A *bonâ fide* purchase of a horse in market overt, changes the property. Post. 485.

TRESPASS. It was held PER CURIAM, that if one takes my horse, and sells it in a *market overt*, and toll paid for it, but he enters his name falsely in the toll-booth; yet the sale is clearly good, and the property altered, if there was no covin in the vendee: for the *misnomer* of the party is nothing to him, when he buys it *bonâ fide*, and is not *conusant* of the tortious taking; and they advised the plaintiff to discontinue his suit, and ordered that small costs should be assessed: and it was so done.

Sed vide Owen 17. 1 Leon. 158. Jones, 163. 2. Inst. 717. 2. Term Rep. 750.

Case 7.

King's Case.

What acts of misbehaviour will amount to the forfeiture of a recognisance for good behaviour.

KING was indicted, for that whereas he was bound by recognisance to be of good behaviour, he had said to one *Kirton*, that "he was a pelter, and a teller of lies, and a drunkard; and that "he would make him a poor *Kirton*; and that he had entered and "broke the close of *Kirton*;" for which an action of trespass *vi et armis* lieth. And the question was moved by COKE, If these be causes of the breach of his recognisance? for it is a common course in such cases to indict men, which will be evidence in a *scire facias* upon the recognisance.—WRAY and GAWDY conceived at first, that they are no causes of the breach of the recognisance; for the party doth not break his good behaviour, except he doth something in act or shew which tends to the breach of the peace; as if he goeth in warlike manner with weapons, or is in company of riotous malefactors, although nothing be done; or threatens another to beat him, or to fight with him. These (although nothing be done) are breaches of the good behaviour. But when he speaks only words of reproach, which may procure another to break the peace, this is no breach of the good behaviour. And they held clearly, that the entry into the close was no breach, being done peaceably; and he might pretend title to it; although in an action it is supposed to be *vi et armis*, and *contra pacem*. And WRAY said, that nothing shall be said a breach of the recognisance, but that which sounds to the hurt of another, and by intendment may be a breach of the peace; as assault, menace, &c. And he said, if one be leading of his horse, and he that is bound to his good behaviour doth take it from him, this peradventure may be a breach of the good behaviour; for it is an assault upon his person, although he take it peaceably.—CLENCH *contra*. For the words being spoken in disdain and reproach, shall be said a breach of the recognisance; for it may be cause of the breach of the peace, as well as carrying of weapons, or having a great company following him, as 2. *Hen.* 7. is; and the words being malicious and opprobrious, give occasion of blows; but the entry into the close is no breach.—SCHUTE doubted of the words, because they were opprobrious and spoke in malice, and do provoke another to break the peace. And the Court said they would advise. *Vide* 4. *Inst.* 180 & 181.

Palm. 126. Moor, 249. 4. Inst. 180. 2. Hen. 7. pl. 2. 2. Roll. 150. 199. 228. Cro. Car. 499. 2. Leo, 160. Godb. 622. Cro. Jac. 412. Lamb. 116, 118. B. R. H. 158. 1. Burr. 703. 1. Hawk. P. C. 258. 262.

Smith's

Smith's Caſe.

CASE 8.

HE was indicted at the ſeſſions of the peace in the county of *Oxon*, for forging a falſe deed, againſt the ſtatute of 5. *Eliz.* c. 9. And now TANFIELD moved, that this indictment was not well taken before the juſtices of the peace, for they have no power to take it; for the ſtatute is, that Juſtices of Oyer and Terminer, and the Juſtices of Aſſiſe, in their public and open ſeſſion, ſhall have power to enquire of ſuch offences; and giveth no authority to juſtices of the peace in their ſeſſions to enquire of it. And of that opinion were all the Juſtices, that the indictment taken before them was void; for they have ſeveral and diſtinct authorities and commiſſions: one, to hear and determine, which is to be kept in a place, and at a time certain, and is to be adjourned to a certain time; and a commiſſion of the peace, by virtue whereof they are to keep their ordinary ſeſſions; and this indictment was taken before them *ad ſeſſionem pacis*. And EWENS ſaid to them, "So it hath been ruled within theſe two years." But POPHAM, *Attorney General*, ſaid, that he had known divers ſuch indictments taken, and never contradicted, and the parties had ſuffered the puniſhment of the ſtatute. And thereupon the Court ſaid they would adviſe: but in this term the indictment was diſcharged.

The ſeſſions have no juriſdiction in forgery by 5. Eliz. c. 9. Poſt. 601. 697. 9. Co. 118. a. b. 1. Hale, 687. 2. Hale, 44. Cromp. J. 56. b. 2. Hawk. P. C. 59. Cowper, 369.

Higham *againſt* Reynolds.

Michaelmas Term, 29. & 30. *Eliz. Roll* 562.

CASE 9.

TRESPASS for entering and breaking his houſe, and cutting ſix poſts of it, 1. *May*, 28. *Eliz.* The defendant pleads, that as to the breaking of the houſe, and all the treſpaſs except the cutting of the three poſts of the houſe, not guilty. And as to the cutting of the ſaid three poſts, he ſaid, that upon the ſaid firſt of *May*, 27. *Eliz.* it was the freehold of one *Anthony May*, and he by his command entered and cut the ſaid poſts, which is the ſame treſpaſs, &c. ABSQUE HOC, that he was guilty of any treſpaſs before the ſaid ſeven and twentieth year, &c. but doth not traverſe the time after, &c. And upon this plea it was demurred; and it was argued by BRECKNAM of the one part, and by ALTHAM of the other part.—And firſt, exception was taken, for that the defendant pleads as to all the houſe not guilty, and after juſtifieth as to the three poſts; and ſo pleads not guilty to one thing, and juſtifieth for the ſame thing, which is no good pleading; as 21. *Hen.* 7. *pl.* 31.—The ſecond exception and cauſe of the demurrer principally was, for that he ſaith it was the freehold of *Anthony May*, and juſtifieth by his command, 27. *Eliz.* which was a year before the treſpaſs ſuppoſed, and traverſeth the time before 27. *Eliz.* but ſaith nothing to the time after 27. *Eliz.* and relied upon 5. *Edw.* 4. and other books, that he ought to traverſe the time after, as well as the time before.—Third exception, that he ſaith it was the freehold of *Anthony May*, and doth not aver his life; but that exception was over-ruled, that it ſhall be intended he had the fee, when he pleads generally it was his freehold. —ALTHAM anſwered as to the two other exceptions; and ſaid as to the firſt, that although the defendant pleads not guilty generally to the whole houſe, yet he may after juſtify as to parcel; for he hath pleaded not guilty to all, except this ſpecial parcel, and ſo is

In treſpaſs for breaking a houſe the defendant may plead to all the treſpaſs *praeter* three poſts not guilty, and juſtify for the three poſts; and if he ſaith it was the freehold of *A.* who demiſed, &c. he need not aver that *A.* is alive; but if he pleads it was the freehold of *A.* at ſuch a time, and traverſes the time before but not after, it will be bad. Poſt. 860. 4. Co. 14. 9. Co. 27. 2. Salk. 641. 2. Term Rep. 439.

HIGHAM *against* REYNOLDS.

35. *Hen.* 6. And as to the second exception, he said the plea was good, although he doth not traverse the time after. For when he pleads his freehold, or the freehold of another, it shall be intended so to continue, except the contrary be shewn, and therefore need not traverse the time after; and so is 5. *Edw.* 4. *pl.* 15. And to this opinion THE COURT inclined; but they would advise of it; but afterwards it was adjudged for the plaintiff.

CASE 10.

Gosnal *against* Kindlemarsh.

In pleading 13. Eliz. c. 20, it must be averred that the party was absent 80 days *et ultra*; for the statute says 'above 80 days.' Post. 262. 490.

Digg. 126. 3. Bulst. 202. Moor, 540. 3. Bac. Abr. 368. 371. Cowp. 341. 2. Ter. Rep. 749.

DEBT upon an obligation, dated 25. *March*, &c. The condition was, that the defendant be not absent from his benefice by the space of eighty days, nor permute or resign without the assent of the patron, that then, &c. The defendant pleads the 13. *Eliz.* c. 20. by which all leases of parsons made of their benefices where they are absent, by eighty days *et ultra*, and all obligations for enjoying them, shall be void; and alledgeth, that he was absent by the space of eighty days, but saith not *et ultra*. Upon which plea it was demurred. It was moved by COKE, that this was an incurable fault in the plea; for he ought to have said he was absent eighty days *et ultra*; for he may be absent for eighty days, and come again in the night of the eightieth day; and this must be expressly alledged, and not by implication. *Comment.* 143.—And of that opinion was the whole Court; but they moved the parties to agree, and in the mean time they would stay judgment.

CASE 11.

Bagnall *against* Stokes.

The spiritual court must receive such evidence as would be proof at common law. Post. 595. 666. 1. Vent. 335. 2. Inst. 608. 2. Roll. Abr. 291. 299.

PROHIBITION. And surmised, that the defendant sued him, being an executor, in the spiritual court for a legacy; whereas the plaintiff had a release, but had only one witness to prove it. A consultation was granted: but if he had surmised that he had pleaded this release in that court, and produced his witness; and that they would not allow it, because it had not two witnesses; this had been a good surmise. And it was said the plaintiff is at no mischief; for he may have a prohibition after sentence given in that court.

Hob. 12. 12. Co. 65. Het. 87. Show. 158. Comb. 160. Holt. 752. 3. Mod. 283. Ld. Ray. 220. 346. 1161. 1172. 1211. Salk. 547. Carth. 142. Cowp. 424.

CASE 12.

Hamond *against* Barker.

If a man acknowledges and inrolls a deed, he cannot afterwards plead duress.

Moor, 42, 46. 1. Roll. Ab. 862. Owen, 142. 2. Inst. 673. Cro. Jac. 291. Gilb. Uses, 300. Cowp. 597.

TRESPASS. Upon evidence the case was, *J. S.* by deed inrolled in chancery, bargained and sold a house and certain goods to the plaintiff, and after took the goods again, and would avoid this bargain and sale inrolled, by *duress of imprisonment*.—GODFREY said it cannot be avoided by such *nude* matter in fact, 7. *Edw.* 4. *pl.* 5. 39. *Hen.* 6. *pl.* 32. 13. *Edw.* "*Estoppel*" 18. 48. *Edw.* 3. *pl.* 33. for being inrolled, it is a thing of record.—MORGAN *contra*. And he said, a deed inrolled is no record, but a thing recorded, 16. *Hen.* 7. *pl.* 5. and cited BROWN and WESTON'S opinion in one *Morley's Case* accordingly.—THE COURT said, the case was doubtful. and they would advise. But afterwards they conceived it would be hard to avoid the deed by *duress*: but no judgment was given, because the parties agreed.

Richard Scovel *againſt* Jo. Cabel.

CASE 13.

Trinity Term, 29. Eliz. Roll 193.

EJECTIONE FIRMÆ. The caſe was, *Leverſage* made a leaſe to *Stephen Cabel*, *Jo. Cabel*, and *William Pain*, by indenture, "to have and to hold to them for term of their lives. PROVISO, "and it is covenanted and granted between them, that the ſecond "ſhall not occupy the land during the life of the firſt; and the "third ſhall not occupy during the life of the ſecond." The firſt occupieth all and dieth, and then the third enters, and made a leaſe to the plaintiff, who was put out by the defendant; and all this matter was found by ſpecial verdict. The queſtion was, If this *proviſo* be a limitation of the firſt eſtate, and ſevereth the eſtate which was given to the three jointly, and makes each of them in remainder one after the other? or, Whether it be only a *nude* covenant?—HARRIS, *for the plaintiff*. There is a joint eſtate given to them expreſly by the premiſes of the deed; and the words after in the *proviſo* cannot ſever the eſtate, and divide it ſo that one ſhall take after the other; and the *proviſo* is void and repugnant to the premiſes; and he cited a caſe in *Bendloe* to be ſo ruled, 14. *Edw.* 6.—HEAL *contra*. The *proviſo* is an explanation of the premiſes of the deed, and may ſtand with it; and is a limitation of their eſtates, how each of them ſhall take; and cited 8. *Edw.* 3. a leaſe unto two, *habendum* to one for life, remainder to the other. And he ſaid he had known it reſolved in this court, where a leaſe was made to three, *habendum* to them for their lives, *ſucceſſivè prout nominantur* in the deed; this made each of them in remainder after the other. And in the common bench it was ruled, that where a leaſe was made to three for their lives, *habendum* to them, to the uſe of the firſt for life, and after to the uſe of the ſecond for his life, and ſo to the third; they were ſeveral eſtates one after another: ſo here, their intent appearing to be ſo. —GAWDY held ſtrongly, that the *proviſo* ſhall not controul the expreſs limitation before.—SCHUTE and CLENCH *contra*; becauſe their intent appeareth; and one cannot have covenant againſt the other, if they occupy not according to the limitation of their eſtates (*a*).

A leaſe is made to *A. B.* and *C.* for their lives, "*proviſo*, and it "is covenanted "and granted "that the ſecond "ſhall not occupy during "the life of the "firſt, and the "third ſhall not "occupy during "the life of "the ſecond." —This is but a collateral covenant, which ſhall not alter the nature of the eſtate given by the premiſes.

Ante 25. 58.
1. Leon. 317.
Moor, 267.
1. Term Rep. 705.

(*a*) Adjudged for the plaintiff, that it is a joint-eſtate, and that the *proviſo* ſhall not ſever it.

Poſt. 107.

Carden *againſt* Tuck.

CASE 14.

EJECTIONE FIRMÆ. Upon ſpecial verdict it was found, that *J. S.* being ſeiſed of a meſſuage, to which a garden and curtilage did belong, joined together and incloſed with a wall, and there was no way to the garden but through the meſſuage. He deviſed the meſſuage to his ſecond ſon in fee, and mentioneth not the garden or curtilage, nor ſaith *cum pertinentiis*. If the garden and curtilage paſſes? was the queſtion.—After argument by HEAL *of the plaintiff's part*, and DREW *for the defendant*, it was adjudged, that the garden and curtilage did paſs: for they agreed clearly, that a curtilage is as parcel of a houſe, and ſhall paſs in caſe of a feoffment without ſaying *cum pertinentiis*; as a ſtable or dove-houſe. They doubted of a garden, becauſe it is but a place of pleaſure; but afterwards they reſolved the garden did paſs; for it is as well for neceſſity as pleaſure.

By the deviſe of a *meſſuage* a garden and the curtilage will paſs without ſaying *cum pertinentiis*.

Ante 30.
Keilw. 57.
Moor, 24.
N. Bendl. 29.
Plowd. 171.
Co. Lit. 5. b. 56. b.
2. Co. 32.
2. Saund. 401.
3. Leo. 214.
2. Ch. Caſ. 27.

Lit. Rep. 6. See the caſe of Clements v. Collins, 2. Term Rep. 499.

John

Case 15.

John Harris *againſt* Nicholas Bowden.

An action on the caſe will lie for playing with falſe dice, and thereby winning the plaintiff's money.

F. N. B. 95. 1. Roll. Abr. 100. Moor, 776. Cro. Jac. 234. 1. Hawk. P. C. 344. Cowp. 664. 2. Term Rep. 439.

ACTION UPON THE CASE. Becauſe the defendant at *D.* enticed the plaintiff to play at dice, at a ſport called FIVE OR NINE, intending to deceive him and get his money; and he by the defendant's perſuaſion did play with him at the ſaid ſport; and the defendant, in playing at the ſaid ſport, delivered to the plaintiff *quoſdam talos veraciter titulatos* to play with; and when the dice came to the hands of the defendant, he by practice, falſly and fraudulently, *quoſdam alios talos falsè et ſubdolè titulatos, quos numeros quinque vel novem, aliquo jactu unquam attingere ſciviſſet, adtunc et ibidem projecit,* and then played with the ſaid falſe dice (*a*), by which the plaintiff loſt to the defendant divers ſums of money, amounting to forty-one pounds ſix ſhillings and eight pence. And the defendant falſly and fraudulently, under the colour of getting, took and carried away the ſaid money, to his damages two hundred marks. The defendant pleaded not guilty, and it was found againſt him; and it was alledged in arreſt of judgment, Firſt, that the word "*talos*" was no word for "dice." *Sed non allocatur*; for it is a proper word for dice. Secondly, that the word "*luciſſet*" was written with a *c*, which is for ſhining; but the record was viewed, and it was written with an *ſ*: and the plaintiff had judgment.

(*a*) See 16. Car. 2. c. 7. and 9. Ann. c. 14.

Case 16.

William Willoughby's Caſe.

Incloſing a common is not a common nuſance; nor can it be done *vi et armis*; and an indictment for it *teſted* "gaol-"delivery" is bad.

Poſt. 664. 22. Aſſ. 6. 2. Roll. Abr. 83. 1. Vent 26. 6. Mod. 453. 2. Wilſ. 57. 1. Burr. 259. 1. Hawk. P. C. 361. 2. Term Rep. 391.

HE was indicted before the Juſtices of Aſſiſe, for that he *vi et armis* had incloſed certain land, in which *Williams* and others had common, time out of mind. Exception was now taken to the indictment, becauſe it concerneth only the intereſt of particular perſons, and was no common nuſance to the queen's people; and it concerning a private commodity of certain perſons, and not of the queen, or her people in general, the parties grieved are to have their action upon the caſe, 27. *Aſſ.* 10. And *Madox's Caſe* was adjudged the laſt term (*a*), that for a private commodity, remedy ſhall not be by indictment.—2. Exception, that it was *vi et armis*, and a man cannot incloſe his own ground *vi et armis*.—3. Exception, that the *teſte* of the indictment was at the gaol-delivery, in the county of *Nottingham*, before ROBERT SCHUTE, FRANCIS GAWDY, and other Juſtices of the Peace of the queen, &c. in the ſaid county; and for this cauſe it was alledged to be void, for at a gaol-delivery they have no authority to take ſuch indictments (*b*). And this was held a material exception; but the Juſtices ſaid they would adviſe, &c.

(*a*) Ante 361.

(*b*) Sed vide 2. Hawk. P. C. 32. and the caſes there cited, *contra*.

Case 17.

Knight *againſt* Fortipan.

Michaelmas Term, 29. & 30. Eliz. Roll 265.

Surrender by copyholder for life and an infant in remainder, does not bar the entry of the heir to him in remainder.

Poſt. 148. 662. 484. 717. 4. Co. 22. 1. Leon. 95. Moor, 596. 2. Com. Dig. 493. Cro. Car. 103. Gilb. Ten. 192. 1. Term Rep. 393. 600.

TRESPASS. The caſe was, A copyhold was granted to one for life, remainder to an infant in fee; they join in a ſurrender to *A. B.* who was admitted tenant for life, and he in the remainder dies, and the heir of him in the remainder enters; and, If he may enter, or ſhall be put to his *dum fuit infra ætatem?* was the queſtion. And it was argued by TANFIELD and ATKINSON, and the entry was adjudged lawful. For a ſurrender is but a conveyance by matter of fact, and no higher; and the heir may enter, and bring treſpaſs before admittance.

Trewinian *againſt* Howell.

CASE 18.

ERROR of a judgment in *aſſumpſit* againſt the now plaintiff, as executor to *T. Trewinian*, his brother; in which *Howel* declared, that whereas the teſtator was indebted to him in a certain ſum, the ſaid *Trewinian*, the then defendant, did aſſume, that if he had goods ſufficient, that he would pay him; and alledged, that he had goods ſufficient. Upon *non aſſumpſit*, it was found for the then plaintiff, who had judgment. Upon this, error was brought; and the principal error aſſigned was, that there is no ſufficient conſideration alledged; for the having of goods was no conſideration; but in conſideration he would forbear to ſue, &c. this had been a good conſideration. But it was ſaid of the other party, that he being executor, his promiſe (he having aſſets) doth bind him, for he is in duty to pay it.—DANIEL ſaid, it was adjudged in one *Hudſon's Caſe*, that a promiſe of the executor to pay a debt, is binding, if he hath aſſets, otherwiſe not. And ſo COKE ſaid, it was adjudged in *Sir William Cook's Caſe*, that ſuch a promiſe is good without any other conſideration, if he hath aſſets of the teſtator in his hands, otherwiſe not; for the conſideration is only by reaſon of the act and debt of the teſtator; and, therefore, ſhall bind me no further than the goods of the teſtator amount.—Second error, that the judgment was general, and not *de bonis teſtatoris*, as it ought to be; for by ſuch a general judgment, he ſhall be charged of his own goods.—THE COURT ſaid, they would adviſe. But, at another day (*abſente* WRAY) it was adjudged, the judgment ſhould be affirmed; for it was a good *aſſumpſit*, and he ſhall be charged *de bonis propriis*, being of his own promiſe (*a*).

Aſſumpſit will lie againſt a teſtator in conſideration of his having ſufficient aſſets; and if he expreſsly promiſe, the judgment ſhall be *de bonis propriis*. Poſt. 406. Latch. 21. 1. Vent. 41. 9. Co. 94. a. 1. Veſey, 125. Cowp. 284.

(*a*) Vide the caſe of *Hawks* v. *Saunders*, Cowp. 289. and *Richards* v. *Brown*, Dougl. 125.

Oſbaſton *againſt* Garton.

CASE 19.

ERROR of a judgment in an *aſſumpſit*; where *Garton* declared, that *Oſbaſton* did aſſume to pay to him for every ſtone of wool he delivered to him ſix ſhillings and ten-pence; and ſaith, that he delivered to him ſo many ſtone of wool as amounted to thirty-nine pounds ten ſhillings; and alledged further, that *licèt ſæpiùs requiſitus* to pay the ſaid thirty-nine pounds ten ſhillings, he had not paid. The defendant pleaded *non aſſumpſit* to pay the ſaid thirty-nine pounds ten ſhillings, *nec aliquam inde parcellam*; and found againſt him, and judgment. Two errors aſſigned.—1. That he ſaith *licèt ſæpiùs requiſitus*, but ſheweth not the day and place of the requeſt; and this is not properly a debt, but riſeth by reaſon of the delivery of the ſtones of wool; and therefore ought to expreſsly alledge a requeſt, being a duty that accrueth with the commencement of the promiſe, and not before: and of that opinion was the whole Court.—2. Error, for that the iſſue was, that he did not aſſume to pay the thirty-nine pounds ten ſhillings, &c. which is not alledged in the declaration; but that he aſſumed to pay for every ſtone of wool ſix ſhillings and ten-pence, which amounted, &c. and ſo no iſſue was joined: and of that opinion was the Court, and the judgment was reverſed.

Aſſumpſit for goods ſold and delivered, muſt alledge a promiſe to pay their value; a ſpecial requeſt of payment; and the day and place when and where ſuch requeſt was made. 1. Saund. 33. Ante, 74.

And vide 1. Strange, 88. Yelv. 66. 121. 3. Bulſt. 258. Cro. Jac. 639.

Case 20.

Albany *againſt* Sir Anthony Sturline.

A writ of error muſt include the coſts *de incremento*, as well as the coſts and the damages aſſeſſed by the Jury. 2 Sid. 269.

ERROR in the exchequer-chamber upon a judgment in *banco regis* in an *aſſumpſit*. The writ of error ſuppoſed, that the recovery in the action was of 222l. damages, whereas in truth the damages and coſts aſſeſſed by the jury did amount to ſo much; but the Court did adjudge to the plaintiff *de incremento* twelve pounds; ſo as all the damages did amount to 234l. and it was ſaid now in court, that there is no recovery of 222l. only; ſo the writ was no warrant to remove the record, 9. *Hen.* 6. But POPHAM moved, that the writ of error was well brought; for it needed not to have mentioned all the damages; but only what was found by verdict, and might leave out the other.—CURIA *contra:* for when the damages are aſſeſſed, they are entire, and cannot be divided; and thereupon awarded, that the writ of error was not well brought.

Michaelmas Term,

29. and 30. Eliz. In the Common Pleas.

Case 21.

Broker *againſt* Charter.

Roll 2116.

An executor may refuſe to act, by parol; and if he once refuſes, he cannot afterwards adminiſter the effects.

Went. 37. Owen, 44. Moor, 272. Gilb. on wills, 425. 1. Leon. 135. 2. Mod. 146. 9. Co 37. a. 1. Salk. 3. 3. Bl. Rep. 456. 3. Burr. 1465.

TRESPASS. It was found by verdict, that *Sir Ralph Rowlet* being poſſeſſed of a term, did make his will, and thereof did make BACON *the Lord Keeper*, CATLIN *Chief Juſtice*, and others, his executors, and deviſed the term to LORD CATLIN, and died. All the executors writ a letter to DR. DALE, Judge of the Prerogative Court, that they could not attend the execution of the will, and deſired him to commit the adminiſtration to *Henry Goodyer*, the next of kin to the teſtator; and the adminiſtration was accordingly granted: but the Regiſter entered the cauſe, for that the executors did defer *ſuſcipere onus teſtamenti*. After this, CATLIN entered upon the land deviſed to him, and granted it over. The doubt was, If this grant was good? Firſt, If the letter be a ſufficient renunciation? Secondly, If they once refuſe, if they, after adminiſtration granted, may adminiſter at their pleaſure? DR. FORD declared to the Juſtices, that by the civil law, a renouncing may be as well by matter in fact as by a judicial act, and they may refuſe by *parol*; and cited a rule in the civil law, *Non vult eſſe hæres, qui ad alium vult transferre hæreditatem*; and, *Hæreditas eſt totum jus quod defunctus habuit.* And to the ſecond matter he ſaid, *Qui ſemel repudiaverit hæreditatem, amplius hæreditatem petere non poteſt*; and, *Qui ſemel repudiaverit* ſhall not after be executor, *quia tranſit in contractum*; and that executors cannot refuſe for one time, but for ever; but they may pray time to adviſe of taking upon them the executorſhip, and it ought to be granted; and in that caſe the ordinary is to grant in the mean time letters *ad colligendum, &c.* but is not to grant adminiſtration. And for theſe reaſons there being a refuſal, the grant made after adminiſtration committed, was void: and ſo was the opinion of the Court.

Eaſter

Eaſter Term,

30. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Prowſe *againſt* Cary.

CASE 1.

Words charging another with ſubornation of perjury are actionable. Poſt. 99. 1. Mod. 201. 2. Roll Rep. 410. Cro. Jac. 158. Yelv. 72. 2. Salk. 696.

ACTION for words, "Thou haſt procured falſe witneſſes to ſwear in ſuch an action." Upon not guilty, it was found for the plaintiff.—GLANVILE moved in arreſt of judgment, that the words are not actionable; for it is not alledged, that he ſuborned or procured them to ſwear falſly; or that he knew they would ſwear falſly.—CURIA *contra*. For when it was ſaid, he procured falſe witneſſes, it is intended in *malam partem*, that he procured them to ſwear for him, which would ſwear falſly. But if the words had been, "You brought in falſe witneſſes," action did not lie for them.

Mildward et alii.

CASE 2.

An indictment for a forcible entry is bad if it abate the words *manu forti*. Poſt. 461. Cro. Car. 135. 2. Bulſ. 258. 2. Hawk. 349. Burr. 1658. 1731.

AN INDICTMENT upon the 8. *Hen* 6. c. 9. againſt them was diſcharged; for the ſtatute was recited, that if any be of his lands and tenements expulſed or diſſeiſed, or be held out with force, and ſaith not *manu forti*; for the words are, *manu forti* expulſed or diſſeiſed. Secondly, the ſtatute is recited, that the party grieved may have his recovery *per aſſiſam novæ aſſiſæ*, whereas it is to be *diſſeiſinæ*: and the parties had reſtitution.—NOTA, the record of the indictment was removed in *Michaelmas* term laſt.

Jerome and Avicia Uxor' *againſt* Phear and Neale.

Hilary Term, 29. *Eliz. Roll* 515.

CASE 3.

A plea of *molliter manus* do's not extend to juſtify battery or wounding, &c. &c. Poſt. 243. Lut. 929. 3. Lev. 404. 2. Vent. 193. Skin. 387. Ld. Ray. 213. 252. 12. Mod. 388. Salk. 144. 5. Com. Dig. 355. 1. Bac. Abr. 155.

TRESPASS of aſſault and battery, and wounding of the *feme* plaintiff. The defendant pleaded, that the village of *New Sarum* was an ancient city, and that time out of mind it had been uſed there, that upon complaint to the mayor of a battery and affray, that he, as a juſtice of peace, ſhall ſend his ſerjeant at mace, or an officer *conus*, for the party to come before him and anſwer, &c. And alledgeth *in facto*, that *Jerome* the plaintiff had made a battery; and thereupon complaint was made to the mayor: he ſent the defendants (being conſtables there) to attach him, and to bring him before the mayor to anſwer, &c. whereupon they came to him to attach him, and the *feme* plaintiff *eos impedivit*; whereupon they laid their hands upon her *molliter*, to cauſe her to deſiſt, that they might attach him, which is the ſame treſpaſs, &c. and demand judgment *ſi actio*, &c. Upon this plea, it was demurred

murred in law.—COKE argued for the plaintiff, and alledged, that the plea was inſufficient for four cauſes. Firſt, that the preſcription was void, and againſt law. Secondly, that they came to attach him, but ſaith not within the city; and it may be intended in another place out of the city. Thirdly, the defendants alledge, that they did *molliter* lay their hands on her, which is the ſame treſpaſs, but anſwer not to the battery and wounding, nor traverſe it. Fourthly, they juſtified at *New Sarum*, but do not traverſe the treſpaſs, which was ſuppoſed in *Middleſex*. And for the firſt point, COKE ſaid, it is againſt *Magna Charta*, and 25. *Edw.* 3. c. 4. & 42. *Edw.* 3. c. 3. that none ſhall be impriſoned, but by reaſon of indictment, or due proceſs of law, and not upon complaint; and a preſcription to be a juſtice of peace cannot be, for the authority of a juſtice of peace commenced by the ſtatute of 2. *Edw.* 3. c. 16. and before that time they were only conſervators of the peace: and the other matters are apparently vicious, and no defence can be made of them.—THE COURT commanded that judgment ſhould be given for the plaintiffs, and principally for the two latter points; for they would not ſpeak to the firſt, becauſe it touched the authority of mayors, &c. But the next day they commanded judgment to be ſtaid, and that the plaintiffs ſhould come before them; by which it ſeemeth, they intended to make a compoſition. *Vide Cro. Jac.* 664.

Poſt. 268. 384.

CASE 4.

Nicholſon *againſt* Lyne.

Words are actionable, though the fact they impute is puniſhable in the ſpiritual court only. Sed vide Poſt. 502. *contra.*

ACTION for words. That the plaintiff being a miniſter, the defendant ſaid of him, that "he had two wives (*a*)," to cauſe him to be deprived. Upon not guilty, it was found for the plaintiff.—COKE moved in arreſt of judgment, that the words were not actionable, for it is a ſpiritual fault; as to call one heretic, &c. But it was anſwered, that foraſmuch as the plaintiff was a miniſter, this is a defamation, and cauſe of deprivation, if true; yet judgment was given againſt the plaintiff.

(*a*) By 1. Jac. 1. c. 11. bigamy is now felony.

CASE 5.

Pearle *againſt* Unger.

An *aſſumpſit* will lie where part of the conſideration is executed. Ante, 42. Poſt. 138. 1. Leon. 102. 1. Com. Dig. 142.

ASSUMPSIT. And declares, that he was poſſeſſed of certain land for years: the defendant, in conſideration he had occupied the land, and had paid the rent to the defendant, *viz.* thirty pounds *per annum*, all the time he had occupied it, aſſumed to ſave him harmleſs for the occupation of the land always during the term, as well for the years paſt as to come; and alledges, that before the time of the promiſe, *viz.* ſuch a day, &c. his beaſts were taken damage feaſant, &c. and that the defendant had not ſaved him harmleſs of it: and upon not guilty, it was found for the plaintiff, and damages aſſeſſed.—GOLDING moved in arreſt of judgment, that here is no conſideration to maintain the action; for the conſideration and cauſe of the promiſe was a thing done before, *viz.* the occupation and payment of the rent; which being paſt, are no conſiderations for a thing future to be done.—But it was adjudged for the plaintiff; for the conſideration, that he was in poſſeſſion, and had paid his rent, and was to pay his rent, is ſufficient to cauſe the other to defend his poſſeſſion for the time paſt and to come.

Richardſon

Richardson *against* Pricket.

Case 6.

FALSE IMPRISONMENT. The plaintiff supposed the tres- Pleading.
pass and false imprisonment to be 10. *Dec.* 29. *Eliz.* The defendant pleads, that he, by virtue of a warrant of the sheriff, &c. did arrest and imprison him, 2. & 3. *die Decemb.* before. ABSQUE HOC, that he was guilty before or after, &c.—The plaintiff said he was guilty of the trespass, &c. *after* the third day of *December*, *prout in narratione suâ specificatur.* And upon this they were at issue; and it was found for the plaintiff. And it was said, that the issue was not well joined; for it is, that he was guilty, &c. *after* the third day, &c. but saith not, and *before* the action brought. But it was ruled to be well joined; for when it is said, he was guilty *after* the third day, &c. *prout*, &c. it is to be intended between the third day and the day of which he counted. And the plaintiff had judgment.

2. Term Rep. 172.

George's Case.

Case 7.

ACTION for words, "Thou art a couzening knave; thou hast "couzened me of twenty pounds at such a place, and such a "man of twenty pounds; and there is never a *George* in *England* "but he is a couzening fellow." Upon not guilty, it was found for the plaintiff. [And it was ruled, that the action lieth not; for WRAY said, they are too general to bear an action; and a man is to suffer no pain or loss for those words, if they were true.] And one *Egleton's Case* was cited to be adjudged, "Thou art a couzening "coroner; for thou hast couzened *J. S.* of his lands;" no action lieth. And WRAY said, that in a writ of error between *Warker and Middlemore*, which doth depend in the exchequer-chamber, action for these words, "Thou art a couzener, for thou hadst me "to *Coventry*, and didst couzen me of eighty pounds," judgment was given for the plaintiff in the queen's bench; but it was never moved in that Court; for if it had, they would not have given judgment. NOTA, *Trin.* 30. that judgment was reversed in the exchequer-chamber.

Words are not actionable if they are so general that they would not subject the party to punishment, if true. S. C. Moor, 261. Post. 99. 175. Cro. Jac. 427. Cro. Car. 417. 2. Saund. 307.

Docton *against* Priest.

Case 8.

EJECTIONE FIRMÆ. Upon special verdict it was found, that two tenants in common of a house and land made partition within the house, of the house and land, by *parol* without deed: the question was, If it were a good partition? And the opinion of the Court was, that a partition between tenants in common upon the land, is good without deed; for it amounts to a livery in law; but it is not so between jointenants, for they cannot make livery one to the other.—But WRAY, C. J. said, that a *partition* made by *parol* of a thing that may pass without livery, as a lease for years, is good. But in this case the partition was in the house, and not on the land, and it was not found the land was within view; and so it cannot amount to a livery in law: and for that cause it was adjudged for the defendant, that the partition was not good for the land, for which only the action was brought.

Tenants in common may make partition by *parole* if accompanied by *livery* at the time; but a partition between joint-tenants is not good without deed. Hargrave's Co. Lit. 169. a. note [2.] 200 b. Cowp. 219. Post. 142.

Knavesburgh's

CASE 9.

Knaveſburgh's Caſe.

An indictment for a forcible entry reciting the ſtatute in the *conjunctive*, is bad. Poſt. 697. 3. Com. Dig. 231.

HE was indicted upon the 8. *Hen.* 6. c. 9. which recited the ſtatute to be, "If any be of land or tenements *manu forti* ex- "pulſed and diſſeiſed in the *conjunctive*;" whereas it ought to be in the *disjunctive*: and for this miſrecital of the ſtatute, the indictment was diſcharged, and a precedent was cited in *Michaelmas* term laſt, of the like judgment for the ſame.

CASE 10.

Tho. Cookſon and Anna Uxor' *againſt* Jo. Caſtline.

Huſband and wife may join in *treſpaſs* for entering *their* land, and taking 20 loads of hay *inde provenient'* Poſt. 133. 2. Vent. 195. 2. Wilſ. 424. 1. Salk. 114. Dougl. 323.

TRESPASS for entering upon their land, *et herbam ipſorum Tho. & Annæ adtunc & ibidem creſcentem meſſuit & ſuccidit, & in fœnum compoſuit, & viginti carucatas fœni inde provenient' cepit & aſportavit.* Upon not guilty pleaded, and found for the plaintiffs, it was alledged in arreſt of judgment, that the action doth not lie for *baron and feme* of the twenty loads of hay taken, &c. for it is a chattel ſevered from the inheritance and veſted in the *baron*, for which the *feme* ſhall not join with him in the action. But the clear opinion of the Court was, that they may well join; for as they may join in treſpaſs *de clauſo fracto*, and cutting their graſs; ſo they may join for the hay coming off it: and it was ſo adjudged; and the like judgment was given this term, between *Wilkes and his wife againſt Derby*.—But WRAY, C. J. ſaid, if it were for taking twenty loads of hay, but ſay not *inde provenient'*, it is otherwiſe; for it may be intended of hay lying upon the land before, for which they cannot join.

CASE 11.

Harward *againſt* Furborne.

Coſts given by a ſtatute ſubſequent to the 6. *Edw.* 1. c. 1. may be recovered in the king's bench, though under 40s. 1. Wilſ. 328. 3. Wilſ. 48. 3. Burr. 1592.

DEBT brought here for ſixteen ſhillings given for coſts of ſuit in an inferior court, upon a non-ſuit by the 23. *Hen.* 8. c. 7. After verdict, GODFREY and HOUGHTON moved in arreſt of judgment; for ſuch a petty ſum, action lieth not in this court againſt the ſtatute of *Glouceſter*, which enacts, that no action ſhall be brought here for any ſum under forty ſhillings.—But THE COURT held clearly, that foraſmuch as the coſts are given by a latter ſtatute, they are recoverable by an action of debt in this court; and they gave judgment for the plaintiff.

Cowp. 367. 1. Term Rep. 73.

CASE 12.

Smith *againſt* Haws.

A deviſe to a ſon for life with remainder to *his* ſon and heirs males of *his* body, remainder to the *right heirs* of the deviſor in tail male. On the death of the deviſor, the ſon takes an eſtate in fee-ſimple as the right heir.

COVENANT. The caſe upon demurrer was, *William Redman*, grandfather, father and ſon. The grandfather was ſeiſed of land in fee, and deviſed it to the father for life, the remainder to the ſon, and the heirs males of his body, remainder to the right heirs of the deviſor, and the heirs males of his body begotten. The grandfather and father die. The ſon dieth without iſſue-male, having iſſue *Anne*. The ſaid *Anne* takes huſband, and the huſband and *Anne* ſell the land to *J. S.* in fee, and did covenant, that they were ſeiſed of a ſufficient and lawful eſtate in fee-ſimple. And if this was an eſtate in tail, or a fee-ſimple in *Anne*, who was the heir of the deviſor, was the queſtion?

Swinb. 180. 1. Term Rep. 630.

GODFREY

GODFREY argued that it was an eſtate tail; for his intent was apparent that his right heir ſhould have an eſtate tail; and it is here as fully limited as if he had expreſsly limited and appointed that he ſhould have an eſtate tail; and his intent being ſo, the law will conſtrue an eſtate tail, his intent not being againſt law; and cited *Huſſey's Caſe*, 37. *Hen.* 8. *Bro.* & 9. *Hen.* 6. *pl.* 25. *by Paſton.* SMITH *againſt* HAWE.

COKE *contra*. It is a fee-ſimple; for immediately by the death of the grandfather, the remainder doth veſt in the father, as his right heir, and veſteth in him as fee-ſimple, and cannot by matter ſubſequent be converted into an eſtate in tail. And ſo it was adjudged. 1. Cr. 24.

Cole's Caſe. CASE 15.

In the Common Pleas.

ASSUMPSIT. And declared, that whereas the defendant was indebted to *J. S.* in twenty pounds, in conſideration that the plaintiff at the defendant's requeſt agreed to give his bond to *J. S.* for the ſaid debt, the defendant did aſſume to ſave him harmleſs; and alledgeth in fact, that he did give his bond, &c. and he was ſued upon it, &c. Upon *non aſſumpſit*, it was found for the plaintiff. Pleading in *aſſumpſit*.

SHUTTLEWORTH moved that the plaintiff had not well declared, for that it is not alledged that he gave notice that he had made the bond, and was ſued upon it. But it was adjudged for the plaintiff; for the defendant at his peril ought to take notice of the obligation, &c. as in a bond to ſtand to award, he is to take notice of it.

ANDERSON, *Chief Juſtice*, ſaid, if one be obliged to make ſuch aſſurance as *J. S.* ſhall adviſe, he ought to take notice of the aſſurance deviſed at his peril, becauſe a certain perſon is appointed to do it. But if it be ſuch aſſurance as *my* counſel ſhall adviſe, I ought to give notice of the aſſurance; for he cannot take notice who is my counſel. And for the other point, he ought to ſave him harmleſs without requeſt, *viz.* by payment of the money, or, &c. Ante, 9.

Edward Seymour *againſt* Sir Jo. Clifton. CASE 14.

In the Exchequer Chamber.

ERROR. The error aſſigned was, For that the iſſue was joined, that "*Jo. Clifton hoc petit quòd inquiratur per patriam, et Edwardus Seymour ſimiliter*," but ſaith not "*prædictus*." But inaſmuch as there was no other *Edward* named in the record but the defendant, and ſo cannot be intended another perſon, and the word "*prædictus*" is but of form, and not of ſubſtance, it is aided by the ſtatute, and may be amended; and the word "*prædicti*" was put in, and the judgment was affirmed. *Prædictus* omitted in entering the *ſimiliter*. Gould. 89.

CASE 15.

Stranſham's Caſe.

In trover, the converſion is the *tort* which is the ſubſtance of the action, and therefore traverſable. Poſt. 201. 377. Ante, 78. 10. Co. 56. b. Gouldſ. 89. Yelv. 166. Cro. Car. 262.

COKE ſaid, it was adjudged in action of trover and converſion, that the converſion is traverſable; for it is the ſubſtance of the action, and the *tort* ſuppoſed in him, and ſo may well be traverſed; for if one finds goods, but doth not convert them, no action lieth; as the caſe was in a trover and converſion of goods, the defendant ſaith he took them *damage feaſant*, and impounded them, ABSQUE HOC that he converted them to his uſe. And in *Leake's Caſe* it was adjudged that the place and time of the converſion are to be alledged, for they are material; and for that they were not alledged, the bill was abated after verdict (*a*).

1. Brownl. 8. 5. Com. Dig. 30. 118. 2. Term Rep. 756.

(*a*) Sed vide 16. & 17. Car. 2. c. 8.

CASE 16.

Coke *againſt* Barrows.

Aſſumpſit. Cowper, 290, 294. 1. Term Rep. 21. 62.

ERROR. For that the plaintiff in *aſſumpſit* declared, that whereas he was indebted to *J. S.* in forty ſhillings, the defendant, in conſideration he had delivered forty ſhillings to him, did aſſume to pay it, and to diſcharge him againſt *J. S.* and alledgeth that he had not diſcharged him, but ſuffered him to be ſued for the forty ſhillings by *H. C.* executor of *J. S.* but doth not alledge that *J. S.* was dead.

But THE COURT held it good enough; for the plaintiff had directly alledged, that he had not diſcharged him; and the other matter is but circumſtance; and the judgment was affirmed.

30. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Inglebath *againſt* Jones.

CASE 1.

Int. Hilary Term, 30. Eliz. Roll 506.

ACTION for words: "Thou art a bankrupt knave, and a "pocky knave, and let them bear witneſs that ſtand by, "and I will prove it." The defendant pleaded that he ſpake the words at *D.* in *Eſſex*, and that at ſuch a place, &c. he had made an accord with the plaintiff for all treſpaſſes, actions and debates in every place (except in *London*), and had given him ſatisfaction for them, ABSQUE HOC that he ſpoke theſe words in *London*. The plaintiff replied, that he ſpake the words in *London prout, &c.* ABSQUE HOC that he made ſuch an accord *prout, &c.* Upon this it was demurred in law; for it was ſaid the plaintiff muſt maintain his declaration, and is not to traverſe that which was but an inducement to the traverſe.—GLANVILE. The traverſe taken in the replication is good; for the place where the words are ſpoken is not material; but when the defendant by his plea hath made the place of ſpeaking material, there the plaintiff hath election to maintain his declaration, and that the words were ſpoken there, and join iſſue upon it; or may by general words maintain his declaration, and traverſe that which is falſly alledged to take from him his action; and he is to be received to which of the pleas he pleaſeth; and cited 32. *Edw.* 3. *pl.* 23. 46. *Edw.* 3. *pl.* 30. 10. *Edw.* 4. *pl.* 2. And afterwards it was adjudged for the plaintiff.

In an action for words, if the place *where* is made material by the defendant's plea, the plaintiff may at his election traverſe the place and join iſſue upon it; or may, by general words, maintain his declaration. Poſt. 153. 407. 418. 667. 716. 842. 868. Co. Lit. 282. b. 1. Saund. 22. Moor, 429. Stra. 118. Ld. Ray. 121, 370.

Engurſt *againſt* Browne.

CASE 2.

ACTION for theſe words: "Thou wert a ſuitor to a wo- "man in *Southwark*, and didſt couzen her of her goods, "and procured certain falſe witneſſes to be forged." After verdict it was alledged by DANIEL in arreſt of judgment, that the words are not actionable; for the firſt words, "Thou didſt "couzen, &c." have been lately adjudged not actionable. And for the laſt words there is leſs doubt; for it appeareth not what their teſtimony doth concern, nor that the forgery of it is to any purpoſe; for it may be of ſome ſmall matter.—And the Court commanded judgment to be ſtayed; for WRAY ſaid, they are *petit parols* to maintain an action.

Judgment in ſlander ſtayed, becauſe the words were *petit parols*. Ante 93. 95. 1. T. Rep. 110.

CASE 3.

Nash *against* Edmunds.

Michaelmas Term, 29. & 30. Eliz. Roll 261.

A devise of lands not written by the devisor, or by his consent, is void.

Keilw. 209. And. 34. 3. Lev. 1. 1. Bl. Rep. 9. 2. Bl. Com. 376. Sid. 362. 2. Keb. 345. 1. Leon. 113. 3. Rep. 31. Gilb. rt on Wills, 375. Gilb. on Dev. 85. Powel Devi. 27. Cowp. 49.

EJECTIONE FIRMÆ. And declared upon a lease made to him by five women, daughters and heirs of *Jo. Dover*. Upon not guilty, the jury gave a special verdict:—"The said *Dover* was "seised in fee of the land held in socage, and that he declared to "*William North* and others his will to be, that *J. C.* lessor of the "defendant should have his land; and the said *William North* re-"cited the words to him, and asked him if this was and should be "his will; and he answered, that it was. And they further find "that the said *North*, in the life of *Dover*, and for his own remem-"brance, and without the appointment of *Dover*, writ the said will, "and afterwards *Dover* died." And if this were a good will, being spoken with such direct words, and being writ in his life by the witness for his own remembrance, and without the appointment of *Dover?* was the question.—All the Justices (who shewed their opinions *seriatim*) held it to be a void devise, because the will was not writ by the commandment of the devisor, or by his consent, but of the person present, of his own head; but if he had writ it without the devisor's consent, and afterwards had read it to him, and he had agreed to it, this had been as good as if written by his appointment, as *Browne's Case*, *Dyer* 72. And if in the principal case it should be a good will, it would be a great mischief; for then if one should say to another when he is in health, "I devise "such land to *J. S.*" and he afterwards writeth it in the life of the party, but he never hears of it afterwards nor agreeth to it; if this should be a good will, it were not reasonable; for perhaps he had afterwards altered his intention. And judgment was given accordingly.

Cowp. 52.

NOTA. ROBERT SNAGG, who argued in this case, said it was ruled in chancery in *Sir Richard Pexall's Case*, when he devised certain land to his wife for life, and commanded it to be written, and it was written, and a proviso added by the writer, that if she married that the devise should be void; and this being read to him, he said the proviso was no part of his will, but for the residue it should stand; and he died before the will was altered, and the proviso was adjudged to be void, and the rest of his will did stand good.

And now by 29. Car. 2. c. 3. all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed in his presence, by three or four credible witnesses.

CASE 4.

William Collins *against* Edward Vaughan.

An information on 21 Hen. 8. c. 13 f. 26. is bad if it says *absentavit* omitting *voluntarij*. Cowp. 341. (a) The defendant is intitled to costs on a nonsuit. Cowp. 366.

INFORMATION for the queen and himself against the defendant (*a*), vicar of the church of *Englishcomb* in *com' Somerset*, for that *absentavit se*, and had not been resident by the space of a whole month together. After verdict WALMSLEY moved in arrest of judgment, that the information was insufficient; for the statute is, if he absents himself *voluntarie*, which is not alledged; for if he be absent by compulsion or restraint, it is out of the statute. And of that opinion was the whole Court, that the word *voluntarie* is of force, and must be in of necessity.

Morgan's

STANFORD LIBRARY

Morgan's Caſe.

CASE 5.

ERROR to reverſe an outlawry upon an attainder of *Tho. Morgan* his father, whoſe ſon and heir he is, who was attainted and hanged for the murder of one *Turbervile*.—COKE aſſigned the error in the indictment, for that the ſaid *Thomas Morgan* was indicted in the county of *Somerſet*, that whereas the ſaid *Thomas Morgan nuper de D. in com. Dorſet gen. apud W. in comitat' prædict'* ſuch a day did ſtrike and kill the ſaid *Turbervile*; and the exception was, the ſtroke and death was at *W. in com. prædict'*; and that ſhall be intended in *com' Dorſet* which was laſt mentioned, and then the indictment in *com' Somerſet* is merely void; for "*Somerſet*" is not named in the body of the indictment, but in the margent. And of that opinion was the Court; but they would reſpite the giving of judgment until the Attorney General was acquainted with it. *Vide* 18. *Edw.* 2. "*Brief*" 828.

In an indictment if the fact be recited in the county *aforeſaid*, and this relative refers to a different county than that in the margent, the attainder ſhall be reverſed. Poſt. 184. 333. 436. 606. 656. 658. 739. Co. Lit. 22. b. 2. Hawk. 314. Cowp. 682.

Marſhal *againſt* Hobſon.

CASE 6.

ERROR of a judgment after verdict in the city of *York*. Two errors aſſigned.—Firſt, the plaintiff brought a *formedon by bill*, and declared there according to the cuſtom, and for that the land was freehold, which is not recoverable but *by writ* in any court, therefore being *by bill* it was erroneous. And GODFREY ſaid, in any court where land is to be recovered, he ſhall have *a writ cloſe* or any other writ, and ſhall declare according to his caſe and the nature of the ſuit, *Fitz. Nat. Br. f.* 26. *Hen.* 6. "*Error*" 28. 14. *Hen.* 4. *pl.* 34.—Second error. The judgment was, that the defendant *eat ſine die*; whereas it ought to be, that the plaintiff ſhall take nothing by his bill.—And it was held an apparent error; for ſuch judgment ſhall not be given but where the queen is plaintiff, againſt whom no judgment ſhall be given; or where the judgment is final, that the defendant ſhall hold it *a touts jours*.

Judgment in *formedon* reverſed, becauſe the ſuit was by *bill*; and the judgment *eat ſine die*. Co. Lit. 363. a.

Pell *againſt* Pell.

CASE 7.

DEBT upon an obligation of an hundred marks. The condition was, If he pay fifty pounds the bond ſhall be void. The defendant pleads tender at the day, and none was there to receive it; and upon this they were at iſſue. Afterward the defendant pleads that *puis le darraine continuance* this hundred marks were attached in his hands in *London*, at the ſuit of, &c.—GAWDY, *ſerjeant*, ſaid the plea was not good; for an attachment cannot be pending a ſuit in this court: alſo he pleads, the fifty pounds was tendered, and ſo the hundred marks were not due, and the attachment cannot be of the hundred marks; and this is no ſuch plea as can be pleaded *puis le darraine continuance*, for this ariſeth by the defendant's own act, and may be intended to be by *covin*.—THE COURT was in doubt for the firſt point, and commanded that the precedents be ſearched, if any ſuch attachment had been allowed pending a ſuit here, or in the common pleas; but they held, that the attachment of the hundred marks (if attachable) was well enough, for it is always to be demanded in that manner, and it is according to the obligation. And to the third, they held it may be well pleaded *puis le darraine continuance*, for it goeth in bar at another day.

An *attachment* ſhall be of the penalty of a bond, but judgment ſhall be for the principal only; and ſuch attachment may be pleaded *puis le darraine continuance*; but if a ſuit be for the debt in a ſuperior court, it cannot be attached. 1. Sid. 327. 1. Roll. Ab. 552. 3. Leon. 210. 1. Bac. Abr. 691. 2. Term Rep. 388. Poſt. 157.

PELL *againſt* PELL.

DALTON ſhewed a precedent in the common pleas, *Mich.* 12. & 13. *Eliz.* 164. Such attachment was made pending the ſuit and after the laſt continuance. But afterwards the parties compounded.

CASE 8.

Lacy *againſt* Smith.

In trover as adminiſtrator it need not be ſhewn that the perſon who granted the adminiſtration was ordinary. Ante, 6. Poſt. 431.

ACTION *ſur trover*. And declareth as adminiſtrator to *J. S.* and that adminiſtration was granted to him by *A. B.* official to the biſhop of *Peterborough*, and ſheweth not that he was ordinary of the place, or that the granting of adminiſtration did belong to him; and this matter after verdict was alledged in arreſt of judgment. But becauſe divers precedents were ſo, and that ſuch declarations had been allowed, the Court did give judgment for the plaintiff.

1. Salk. 40. Cowper, 140.

CASE 9.

Stubbs *againſt* Rightwiſe.

Trinity Term, 28. *Eliz. Roll* 407.

An executor *de ſon tort* cannot plead in abatement that he is *adminiſtrator* and not *executor*. Poſt. 439. 555. 565. 810.

Hob. 49. 1. Lut. 27. 5. Co. 34. 2. Brownl. 183. Stiles, 337. 3. Co. 52. Went. c. 14. Salk. 313. Ld. Raym. 63. 2. Bac Abr. 389. 391. 5. Com. Dig. 202, 202. 2. Ld. Raym. 1209. 1. Wilſ. 258. 2. Term Rep. 97. 587. 597. Poſt. 406.

DEBT againſt the defendant as *executor* of *J. S.* He pleads that he had taken letters of *adminiſtration*. Judgment of the writ, &c. The plaintiff replieth, that the defendant adminiſtered *de ſon tort*, and after took letters of adminiſtration, judgment, &c. Upon this it was demurred.—GODFREY, *for the defendant*, argued, that now the name of executor is lawfully changed before the action brought, and therefore is to be ſued by his new name as adminiſtrator, 9. *Edw.* 4. *pl.* 33. 21. *Hen.* 6. *pl.* 5. 18. *Hen.* 6. *pl.* 29. 13. *Hen.* 4. "*Executors*" 118.—COKE *contra*. For when by his tortious adminiſtration he hath given advantage to be ſued as executor, he cannot by his own act purge this *tort*, and cauſe the plaintiff to ſue him by another name; but the plaintiff hath election to ſue him one way or other, for he ſhall take no advantage of his own *tort*. As if one in execution eſcapes, and is taken again by the gaoler, he ſhall not have an *audita querela*. And it will be a miſchief if the plaintiff ſhall be compelled to ſue him as adminiſtrator, for it may be that whilſt he adminiſtered of his own wrong, he waſted the goods; and if he be only ſued as adminiſtrator, he ſhall only be charged of the goods that came to his hands ſince adminiſtration, 12. *Rich.* 2. "*Adminiſtrators*" 21. And it was afterwards adjudged that the writ was good, and that the defendant *reſpondra ouſter*.—NOTA. If judgment be given againſt an executor upon demurrer, and execution be awarded, the ſheriff cannot return *nulla habet bona teſtatoris*, but is to return a *devaſtavit*, as if it had been found againſt the executor by verdict; for PER CURIAM he hath charged himſelf by his own plea.

CASE 10.

Melwich *againſt* Luther & Uxorem.

Hilary Term, 30. *Eliz. Roll* 344.

If the lord of a manor grants the inheritance of all the copyholds within his manor whereby they are ſevered, yet the cuſtom remains, and the grantee ſhall hold cuſtomary courts, take ſurrenders, make and grant by copy.—Ante 38. Poſte 150. 210. 299. 325. 522. Sed *quære*. Vide *infra* & Poſt. 443. 5. C. 4. Co. 26. Cro. Jac. 573. 2. Co. 17. a. 8. Co. 64. a. Hob. 181. 4. Co. 60. 1. Ro. Abr. 510. 527. Gilb. Ten. 211. 217. 251. 319.

EJECTIONE FIRMÆ. And declareth of a leaſe made to him by *Jo. Melwich* for twenty-one years of three meſſuages and one cottage in *Eaſtworth*. Upon not guilty pleaded, a ſpecial verdict was given, that the tenements of which the ejectment was

ſup-

MELWICH *against* LUTHER & UXOREM.

ſuppoſed, and divers other tenements in *Eaſtworth* aforeſaid, were time out of mind, &c. until 1ſt *Jan.* 37. *Hen.* 8. parcel of the manor of *Bveridge*, in the county of *Dorſet*, of which manor king *Hen.* 8. was ſeiſed in fee; and that the tenements of which, &c. and the other tenements in *Eaſtworth* were parcel of the cuſtomary tenements of the ſaid manor, and demiſed and demiſable by copy of court-roll, by the lord or his ſteward, to any perſon for life or lives, in poſſeſſion or reverſion, at the will of the lord, according to the cuſtom of the ſaid manor; and at the ſame time one *Alice Melwich*, widow, was a copyholder of the tenements of which, &c. for her life; and that upon the ſaid firſt day of *January*, 37. *H.* 8. the ſaid king by his letters patents did grant to *Jo. Ogden, Eſq.* the tenements of which, &c. and the other tenements in *Eaſtworth*. And find further, that the ſaid *Jo. Ogden* at the ſame time was ſeiſed of a manor called *Harbridge*, in the county of *Southampton*; and being ſo ſeiſed of the ſaid manor of *Harbridge*, and of the tenements of which, &c. and of the other tenements in *Eaſtworth*, at the court of his manor of *Harbridge* held 12. *Junii*, 7. *Edw.* 6. did grant by copy the tenements of which, &c. to one *Ro. Melwich*, and to the ſaid *Jo. Melwich*, to have for their lives *ſucceſſivè* after the death of the ſaid *Alice*, according to the cuſtom, &c. and that this grant was upon the ſurrender of *Henry Dowling* and *Rich. Dowling*, of a copy in reverſion of the ſaid tenements, and they were admitted tenants in reverſion. And find that *Alice* died, and after *Ro. Melwich* entered and died, and that the ſaid *Jo. Ogden* enfeoffed of the ſaid tenements of which, &c. one *Morgan Polden*, who thereof enfeoffed *William Conſtantine*; and after the ſaid *Jo. Melwich* entered and made a leaſe to the plaintiff: and the defendants, as ſervants to the ſaid *William Conſtantine*, and by his command, ejected him; and *ſi ſuper totam materiam, &c.*

2. Term Rep. 415.

The caſe was argued this term by HARRIS *for the plaintiff*, and by EWENS *for the defendant*; and it was afterwards adjudged for the plaintiff. For the Juſtices ſaid, although the tenements are divided from the reſidue of the manor, yet the cuſtom remaineth, and they continue copyholders paying their ſervices and duties, &c. And he which hath the freehold of them may keep a court in any place; and it is not properly a court baron, but as a court of ſurvey, at which copyholds may be well granted, and the lord or his ſteward may grant copies out of court as well as in court, 2. *Edw.* 6. *Brooks*. And a ſurrender being taken, and a new copy granted, is good in whatſoever place it be done. And it was ſaid, if the copyholders die, yet he which hath the freehold may grant them by copy again; and that it was ſo held in the lord chancellor *Hatton's Caſe:* and if they be copyholders of inheritance, they may compel him that hath the freehold to accept ſurrenders and make new admittances, &c. (*a*) NOTA, here nothing was ſpoken of the leaſe for years, if it were a forfeiture or not, no cuſtom being found to maintain it.

(*a*) Cro. Eliz. 39. 394. 443. 662. 4. Co. 26. Co. Lit. 58. a. 1. Mod. 171. Cro. Jac. 582. 4. Inſt. 266. 1. Roll. Abr. 527. Ld. Ray. 658. Comb. 84. 12. Mod. 466. 1. Bac. Abr. 476.

NOTA. A writ of error was brought of this judgment in the exchequer-chamber, and the error aſſigned in the matter of law, but no judgment given; for the parties compounded, and agreed with the plaintiff in the writ of error, and he had the land, as *Ewens* who was of his counſel told me. For he ſaid that all the Juſtices and Barons in the exchequer-chamber did hold clearly,

MELWICH *againſt* LUTHER & UXOREM.

that it was a void grant by copy; for being divided from the manor, the cuſtom to demiſe them is altogether gone and deſtroyed, ſo as the eſtates for life which were *in eſſe* at the time of the alienation of the freehold of them and ſeverance of them, being now determined by ſurrender, or otherwiſe, no new copy can be made: yet the alienation of the freehold of them doth not deſtroy the eſtates of the copyholders then *in eſſe*, but they ſhall hold them during their eſtates, paying their ſervices, but no new eſtates may be afterward granted by copy (*b*).

(*b*) See the concluſion of the caſe of Bright v. Froſt, Poſt. 443.

CASE 11.

Cæſar *againſt* Stone.

The *exigent* muſt mention where the ſheriff is to bring the body.

ERROR to reverſe an outlawry. The error aſſigned was, that in the writ of exigent no place was mentioned where the ſheriff was to have the body; ſo that the ſheriff cannot know into what court to bring the body. And for this cauſe the judgment was reverſed. 33. *Edw.* 3. "*Brief*" 918. 27. *Hen.* 6. *pl.* 2.

CASE 12.

Peterſon's Caſe.

A defendant cannot take advantage of his own miſpleading.

DEBT upon a bond. The defendant pleaded the ſtatute of uſury in bar, that there was an agreement between the plaintiff and him, that the plaintiff ſhould deliver to him wares of the value of twenty pounds, and that the defendant ſhould pay for the ſame within ſix months thirty-four pounds; upon which they were at iſſue, and found againſt the defendant.

DANIEL moved in arreſt of judgment, that it not being alledged that the obligation was made for the payment of this money, it was no plea or iſſue.—*Sed non allocatur*; for he ſhall not take advantage of his own miſpleading: and judgment was given for the plaintiff.

CASE 13.

William Griffith *againſt* Ro. Apprice.

Error lies in the king's bench on judgment in ejectment at the grand ſeſſion in Wales. Poſt. 826.

5. Co. 105. Moor, 248.

ERROR of a judgment in *ejectione firmæ* in the county of *Denbigh*, before the Juſtices there. The error was apparent; for the writ did bear date 16. *April*, 28. *Eliz.* and the ejectment was ſuppoſed 27. *Aprilis*, 28. *Eliz.* and ſo cannot be defended. But WINTER ſaid, that by the 35. *Hen.* 8. c. 26. ſ. 113. judgments given in perſonal actions in *Wales* ſhall be reverſed there, and this is a perſonal action.—EGERTON, *Sollicitor*, *contra*. For this action doth ſound in the realty, and the ſtatute did not intend that titles ſhould come in queſtion before the counſel of the Marches; and the ſtatute is in the affirmative, and therefore doth not take away the power at the common law; and although he may ſue there by the ſtatute, yet he may ſue here if he will, as he might before (*a*).—Afterwards it was adjudged that this Court had juriſdiction, and the judgment was reverſed.

(*a*) 2. Inſt. 200. Bro. Par. 70. Co. Lit. 64. Plowd. 206. 2. T. Rep. 89.

CASE 14.

Elred *againſt* Waſs.

Outlawry reverſed for the variance of a letter in the proceſs; and becauſe the *alias capias* was returned by the ſheriff when out of office.

ERROR to reverſe an outlawry in debt. COKE aſſigned the errors.—Firſt, The defendant in the original was named *Elred* according to his true name, and in the mean proceſs, *viz.* the *capias*, he was named *Eldred*, and ſo is erroneous; for if there be

—Ante 50. 85.—Poſt. 105. 257.

any difference by omiſſion, addition, or interpoſition of any letter between the original and judicial proceſs, it is erroneous. In *Tr.* 26. *Eliz.* outlawry reverſed upon a difference, *viz. Walwyn* and *Walweyn*: 2. *Rich.* 3. *pl.* 13. *Sein-John & Saint-John*: ſo in *Fiſher*'s caſe, *York* for *Yerk*.—Second error, which was error *in fait*, that the *alias capias* was returned by one *Felton*, whereas he was then removed from his office, and *Townſend* was ſheriff; to which they had pleaded *in nullo eſt erratum*, and ſo the Court ſhall intend it to be true; and this he ſaid was a dead fault.—And for theſe errors the judgment was reverſed.

Elred *againſt* Wase.

New's Caſe.

Case 15.

ERROR upon a judgment given in debt on bond, in the court of *Havering*, in *Eſſex*. The condition of the obligation was for the payment of 20l. to the plaintiff at his houſe at *S.* in *Kent*. The defendant pleaded "*payment at the day*," *ſecundum formam & effectum indorſamenti prædict'*. The error aſſigned was, that the iſſue was tried at *Havering*, and not at *S.* in *Kent*.

But it was ſaid, that this is no error; for when a thing iſſuable is alledged, and no place, this ſhall be tried where the action is brought; and the words *ſecundum formam, &c.* refer only to the time, and not to the place; for the place is not material, payment being made to the obligee himſelf: and it doth not appear, but *S.* in *Kent* may be within the juriſdiction of *Havering*; for it is not ſaid in the county of *Kent*, but at *S.* in *Kent*; and there may be ſuch a place called *Kent* in *Havering*.—Afterwards *Mich.* 30. & 31. *Eliz.* the judgment was affirmed.

Where iſſuable matter is alledged, and no place mentioned, it ſhall be tried where the action is brought.

1. T. Rep. 151.

Leat *againſt* Jenning.

Case 16.

ERROR of a judgment in an inferior court. The error aſſigned was, that the diſtreſs was awarded returnable at the next court, after the ſerving of the proceſs; and every return is to be at a day certain; and it may be the proceſs ſhall not be ſerved within a year, and the defendant is to have day at every court, otherwiſe the proceſs is diſcontinued, 9. *Eliz. Dyer*, 262.—Afterwards for this cauſe the judgment was reverſed.

Every return muſt be at a day certain.

2. Cro. 314. 1. Mod. 81. 1. Vent. 182. Raym. 204. 1. Roll. Ab. 484. Cowper, 178.

Dinſlow's Caſe.

Case 17.

HE was indicted upon the 5. *Eliz.* c. 9. for perjury; and the indictment was, that *tacto per ſe ſacro Evangelio falſo depoſuit*; but it was not directly alledged that he was ſworn, and the indictment was diſcharged; for the Juſtices ſaid, when ſuch a heinous crime is objected againſt one, it ought to be fully alledged, otherwiſe it is not good.

3. Bac. Abr. 817. Dougl. 156.

An indictment for perjury muſt directly alledge that the defendant was ſworn.

1. Hawk. P. C. c. 69. ſ. 17. 1. T. Rep. 69.

George Lovegrove *againſt* Inocke.

Case 18.

PROHIBITION The ſuit in the ſpiritual court was againſt the plaintiff by the name of *Gregory Lovegrove*, as appeareth by the libel, which (in truth) was a wrong name; yet for this variance between the prohibition and the libel, the prohibition was abated.

Cowp. 178.

A variance between the libel and prohibition in the chriſtian name, is fatal. Ante 104.

1. T. Rep. 237.

CASE 19.

Meggot *againſt* Broughton.

The king's bench, on error, may reverſe its own judgment ſigned againſt two, where one dies between the *niſi prius* and day *in bank*.

Ld. Raym. 151. 2. T. Rep. 637.

ERROR upon a judgment given in this court this term. The error aſſigned was, that in an *aſſumpſit* againſt two, mean between the verdict and the judgment, one of them dies, and notwithſtanding judgment was given. Upon this it was demurred, if error lieth here; for it was ſaid, that this Court cannot reverſe their own judgment, except it be for error in proceſs, and not for error *in fait*. But it was ſaid on the other part, that in *Gourney's Caſe*, where an infant appeared by attorney, whereas he was to appear by guardian, and recovery was had, and error brought here, and for this error *in fait* judgment was reverſed.—And it was afterwards adjudged, that the writ of error was well brought here; for the death, &c. was by the act of God, and a thing that did not lie in their cognizance: and it was clearly agreed, that the death of one of the parties did abate the writ; and the judgment was reverſed.

CASE 20.

Foſter *againſt* Walter.

A deviſe to a corporation is good, though it is not by their corporate name.

S. C. 2. Leon. 165. 10. Co. 125. 2. Plow. 345. Daliſ. 78. Owen, 35. 10. Rep. 57.

EJECTIONE FIRMÆ. The caſe was, *Richard Wager*, 6. *Edw.* 6. did deviſe a meſſuage to *A.* his wife for life, remainder to his ſon in tail; and if he dieth without iſſue, or be unthrifty, that it ſhall remain to the maſter and wardens of the myſtery of cordwainers, *London*; whereas they were incorporated by the name of maſter warden and commonalty, &c. The queſtion was, If by reaſon of this *miſnoſmer* of the corporation, the deviſe was void? And it was argued by DANIEL that it was, and by COOPER *contra*.

THE JUSTICES held the deviſe good; for by intendment the deviſor had not counſel there, nor had cognizance of their name; and being known uſually by that name, there is a ſufficient intendment what corporation he doth intend ſhall have it.

CASE 21.

Eaſt *and* Wilſon.

A ſtatute recited to be made at *Weſtminſter* muſt ſhew the county in which it lies. Sed vide Dyer, 203. 2. Hawk. 351.

THEY were indicted upon the 8. *Hen.* 6. c. 9. for forcible entries; and the ſtatute was recited to be made at *Weſtminſter*, but ſhewed not in what county; and the indictment was diſcharged.

Michaelmas Term,

30. and 31. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Scovel *againſt* Cabell.

CASE 1.

THE caſe was argued by COKE *for the plaintiff*, and GAWDY, *ſerjeant, for the defendant.*—COKE argued, that by the premiſes the parties to whom, and the land demiſed, being expreſſed, and in the *habendum* the eſtate being limited, as the office of the *habendum* is, the PROVISO that cometh afterwards ſhall not avoid it; for it is repugnant and void: as 21. *Hen.* 7. leaſe for two years, PROVISO he ſhall not occupy it for one year, is void: 6. *Rich.* 2. "*Quid juris clamat*" 20. Leaſe for years, PROVISO he ſhall not take the profits. And in this caſe, the leſſor was tenant in tail, and he maketh this leaſe, as by law he may; and he cannot make it to have to one for life, the remainder to another for life, &c. And to make conſtruction that it ſhall be to one for life, the remainder to another for life, will deſtroy the leaſe. —And afterwards it was adjudged for the plaintiff, that it is a joint eſtate, and the PROVISO ſhall not ſever it.

See the commencement of this caſe, ante 89. 1. Bac. Abr. 412. Co. Lit. 44. b. Moor, 267, 8.

Bellicote *againſt* Taylboys.

CASE 2.

ERROR of a judgment in the court of *Barnſtable*. The error aſſigned was, that the plaintiff counts, that he and the defendant did account together of divers reckonings, and he was found in arrearages 10 l. 2 s. 3 d. which he aſſumed to pay. Upon *non aſſumpſit* it was found, that he aſſumed to pay ſo much as he was found in arrearages of account, which was 7 l. 2 s. 3 d. and that he aſſumed to pay ſo much as was contained in ſuch a bill, in which he was indebted to him, which did amount to 3 l. ſo all that he aſſumed to pay was 10 l. 2 s. 3 d. and the plaintiff had judgment. A writ of error was brought, and this error was aſſigned; but the Court delivered no opinion.

An inſimul computaſſent for 10 l. 2 s. 3 d. is proved by evidence of a balance of 7 l. 2 s. 3 d. and of a particular debt of 3 l. Dougl. 666. 1. Term Rep. 240. 447.

But for another manifeſt error in the record, *viz.* the judgment was "*capiatur*" where it ought to have been "*in miſericordiâ*," the judgment was reverſed (*a*).

(*a*) Sed vide note (*a*) page 8.

Bricket

CASE 3.

Bricket's Case.

Matter which may be rejected as *surplusage* shall not vitiate an indictment. 5. Co. 121. a. 1. Hale, 169. 2. Hawk. 314. Dougl. 4. 667. 1. Salk. 328. 1. Ter. Rep. 320.

THE Indictment was, That *R. Bricket* and the others, &c. *coram J. S. et J. D. duo justiciariis dominæ reginæ, &c.* and that the exception was, that it should be *duobus*, and as it is, it is false *Latin*, and without sense; and if it be not false *Latin*, this cannot be referred to those named before, which are named in the ablative case.—But THE COURT held it well enough; for the indictment shall not be overthrown for false *Latin*, if by any intendment it can be good; and although here is false *Latin*, yet it may be well enough intended in the meaning.

A venue laid in a parish, held good. Post. 117.

Second exception. *Bricket* and the others are named of *Nuneaton* in the county of *Warwick*, and the indictment being for riot, that they assembled themselves at *Artleborough*, in the parish of *Nuneaton* aforesaid, and saith not in what county *Artleborough* is; for it was said, that *Artleborough* may be in the parish of *Nuneaton*, and yet in another county.—But THE COURT held it well enough; for it appeareth not that *Artleborough* is a town, but it may be a place known by such a name in the parish of *Nuneaton*; and being named in the parish of *Nuneaton*, it shall be intended to be in the same county.

CASE 4.

Trussel *against* Aston.

Leave given to compound on 23. Hen. 6. c. 9. because the statute was mis-recited.

Dougl. 94. 97. 2. Term Rep. 569.

DEBT upon obligation. The defendant pleaded the 23. *Hen.* 6. c. 9. and would avoid the obligation, that he being in execution, and the plaintiff being under-sheriff, he took this bond, and let him at large. It was demurred in law, because the defendant mis-recited the statute, in that he did recite, that if any sheriff, *aut ejus officiarii*, where it should be *alii officiarii*. And the statute speaketh not only of the sheriff and his ministers, but of other officers.—COKE said, so is the parliament roll; and so it was adjudged in one *Herris' Case*.—And of this opinion was THE COURT; but they gave day to the parties to compound, and in the mean time should stay judgment.

CASE 5.

Ros *against* Morris.

Easter Term, 30. *Eliz. Roll* 196.

A devise to *A.* for life, with remainder *ad usum rectorum hæredum in perpetuum, secundum antiquas evidentias inde factas*, where there were several different evidences, and it was *uncertain* which was intended, creates A FEE SIMPLE; for it shall be taken to be the intention of the devisor, that the estate shall go to his heirs generally, according to the rules of law. 3. Com. Dig. 220.

REPLEVIN. The defendant avows as servant to *Jerom Weston, Esq.* The case upon demurrer was, One *Gomerly* was seised of the manor of *Nayland*, and by deed 25. *Edw.* 3. gave it to *Lord Henry Scrope*, and to the heirs of his body, who died seised, and so continued by divers discents until 4. *Hen.* 7. and then *Thomas Lord Scrope* suffered a common recovery, which was to the use of him and his heirs, and retakes an estate of the feoffees to him and his heirs; and having issue *Ralph* and *Jeffery*, and three daughters, dieth. *Ralph* maketh a feoffment to the use of himself and his heirs, and 7. *Hen.* 8. deviseth it to *Jeffery* for life, and after *ad usum rectorum hæredum in perpetuum, secundum antiquas evidentias inde factas*, and died seised of this use, and of the use in divers other manors in fee. *Sir William Danby* marrieth with one of the daughters, and afterwards *Jeffery* dieth without issue. *Sir William Danby*. S. C. 2. Leon. 21.

and his wife, and the other ſiſters (being alſo married) being ſeiſed of theſe uſes, make partition, and allot the uſe of this manor to *Sir William Danby* and his wife, and the heirs of the wife; and the other uſes of the other manors to the other two daughters. *Sir William Danby* and his wife die. *Sir Thomas Danby* their heir enters, and infeoffed *Weſton*.

Ross *againſt* Morris.

Upon this caſe the points were two.—Firſt, If it was an eſtate in tail, or fee in the daughters, who were ſiſters to the deviſor, and iſſues of the body of *Thomas*, father of the deviſor?—Secondly, If this partition be void or voidable?

GODFREY, COKE, and COOPER, argued for the plaintiff, that it was an eſtate in fee in *Jeffery*, and ſo in the daughters; for the words of the will being "*ad uſum rectorum hæredum ſecundum anti-*" *quas evidentias inde præ-antea fait*," it is incertain what evidences he intends; for three evidences were mentioned, *viz.* 1. the eſtate in tail, 25. *Edw.* 3. 2. the recovery; 3. the deed of feoffment; and it appeareth not which of them he intendeth. Alſo it appeareth not, whether he intended the heirs of *Lord Scrope*, or the heirs of *Gomerly*; for by the firſt evidence, the remainder is limited to the right heirs of *Gomerly*; and for this incertainty all was void. But admitting it ſhall be conſtrued an eſtate in tail, according to the evidence of 25. *Edw.* 3. yet it is only an eſtate in tail in *Jeffery*, for he is the firſt perſon that takes it, and hath it as a purchaſor; and when he dieth without iſſue the eſtate tail is ſpent, and none can have it as heir to him.—The ſecond point, they held the partition utterly void; for it being of one uſe in tail, and another uſe in fee, and ſo not equal, and being made between huſbands and wives, is void.

JOHNSON, ATKINSON, and EGERTON, *Solicitor*, *contra*. The will is certain enough, and the ancient evidence can be conſtrued only of that of 25. *Edw.* 3. for the other are but new evidences; and it is helped by the averment, that *Lord Scrope* had no other ancient evidences of this land; therefore the will ſhall refer to it, and ſhall not be expounded to another ſenſe than as the eſtate is there limited: and then, though the firſt effect and eſſence veſteth in *Jeffery*, yet he taking it by limitation, he taketh it as heir of the body of *Lord Scrope*, and this *per formam doni*, and then the daughters ſhall have it ſo likewiſe; for they all claim by one gift. —Secondly, They held the partition good; for there was *quid pro quo*, and ſo only voidable.

But all the Juſtices reſolved to give judgment for the plaintiff (leſſee of *Weſton*), that this is no eſtate tail, but a fee-ſimple in the daughters; for no eſtate is created by the will, for the incertainty of the perſons and evidences alſo, and the intent is to be taken in will. And THE COURT held, that his intent was, that it ſhould go to his heirs generally, according to the courſe of the common law; for divers evidences are ſhewn in the pleading; and it is hard for a man in extremity to remember them, eſpecially that which was made 25. *Edw.* 3.—But for the ſecond matter, if it be an eſtate tail; if it ſhall inure to the daughters, as 2. *Edw.* 3. *pl.* 1. or be extinct upon the death of *Jeffery* without iſſue, who was the firſt purchaſor, according to the opinion in *Griſwold's Caſe* (*a*); they ſaid they were of divers opinions: but for the principal matter they gave judgment for the plaintiff.

(*a*) Dyer, 156. See alſo Co. Lit. 220. Cro. Car. 24. 1. Mod. 226. 2. Mod. 207.

Clearywalk

CASE 6.

Clearywalk *againſt* Conſtable.

A preſcription to ſeize all goods bought and ſold between aliens, in a particular place, muſt alledge the intent of the ſeizure; as for forfeiture, toll, cuſtom, &c. Poſt. 352.

1. Saund. 312. Cowp. 47.

TRESPASS, for taking of twenty-ſeven pounds of white wool at his houſe in *St. John's Green*, in *Colcheſter*. The defendant pleaded, that the town of *Colcheſter* is an ancient borough, and within the ſaid borough there is, and time out of mind, &c. there hath been a cuſtom, that it ſhall be lawful to any burgeſs of the ſaid borough to ſeize all goods bought and ſold within the ſaid borough to any alien by an alien to the uſe of the queen; and ſuch burgeſs that finds and ſeizeth them, and alledgeth, that at the time, &c. he was a burgeſs there, &c. and that before the time of taking, &c. the plaintiff being an *alien*, bought the ſaid twenty-ſeven pounds of wool of *J. L.* another *alien*; and the plaintiff being then a burgeſs, ſeized the ſaid wool, as things forfeited to the uſe of the queen, and to his own uſe; and demands judgment *ſi actio, &c.* And upon this a demurrer in law.--WHITE, *for the plaintiff*, ſaid that the plea was not good; for the preſcription was not well alledged, that it ſhould be lawful; and doth not alledge a uſe *in facto* to ſeize; for there can be no preſcription or uſe, except ſometimes it is put in ure, 38. *Hen.* 6. *pl.* 16. *b.* 34. *Hen.* 6. *pl.* 15. 4. *&* 5. *Phil. & Mar. Dyer*, 152. *Hunt's Caſe.*—2. He preſcribeth to ſeize the goods, &c. but alledgeth not to what uſe or purpoſe; as for forfeiture, toll, or cuſtom, or ſome other intent, 37. *Hen.* 6. *pl.* 7. 21. *Hen.* 7. *pl.* 16. 8. *Rich.* 2. "*Grants*" 105. The cauſe ought always to be ſhewn of the ſeizure.—And for this cauſe principally THE COURT was clearly of opinion that the plea was ill; and if no cauſe be ſhewn in four days to the contrary, judgment ſhall be entered for the plaintiff.

CASE 7.

Jo. Thirkettle *againſt* Reeve, and Edward Tye and Mary his Wife.

Eaſter Term, 29. Eliz.

The certainty of a declaration ſhall not be impeached by a collateral allegation in the plea.

1. Bac. Abr. 13. 3. Ld. Raym. 1208.

DEBT upon two obligations, each of them of 20l. againſt REEVE, executor of *Rob. Thirkettle*, and EDWARD TYE and MARY his wife, executors of the ſaid *Rob. Thirkettle*; and declared upon two ſeveral obligations, made 14. *July*, and 23. *Eliz.* The defendant *Reeve* pleads, "*ne unques executor, ne unques adminiſter* "*come executor*;" and upon this they were at iſſue. The other defendants, *Edward Tye* and *Mary* his wife, demand *oyer* of the obligations, and of the conditions. The condition of one was, that "WHEREAS *Agnes*, the mother of the teſtator, had deviſed to "the plaintiff forty pounds, upon condition to be performed by "the plaintiff, if the ſaid *Robert* pay it to him after the perfor-"mance of the condition, and within one year after the death of "*Agnes*, that then, &c." The condition of the other obligation was, "If he pay ten pounds after the performance of the condi-"tion, and within two years after the death of *Agnes*, that then, "&c." The defendants plead, that the ſaid *Agnes*, 13. *July*, 23. *Eliz.* made her will, and deviſed the ſaid forty pounds to the plaintiff, upon condition in the ſaid will, that he ſhall releaſe to the ſaid *R. Thirkettle* all actions, &c. except the ſaid forty pounds deviſed to him; and they alledge *in facto*, that the ſaid *R. Thirkettle* required him to make the ſaid releaſe, and that he refuſed to make it, &c. and alledges the death of the ſaid *Agnes*, 1. *Aug.* 27. *Eliz.*

(*Nota*, the declaration in this action was *Mich.* 27. & 28. *Eliz.* so within two years after the death of *Agnes*). The plaintiff ſaid, "he "was not required to make the releaſe;" and upon this they were at iſſue; and alſo being at iſſue, "if *Reeve* were executor?" it was found that *Reeve* was not executor, and that the plaintiff was not required to make a releaſe. It was afterwards alledged in arreſt of judgment, that the plaintiff had brought his action upon two obligations, whereas one was not due; for it was brought within two years after the death of *Agnes*, and damages being given for both entirely, and he had no cauſe to recover upon one, he can recover no part.—But THE COURT held, that this is but the allegation of the defendant; and it appeareth not if *Agnes* then died or not; and the defendant hath not reſted upon it, but pleaded another plea, *viz.* "a requeſt to "make a releaſe," which is a collateral matter, and iſſue taken upon it, and ſo had relinquiſhed the other matter: and judgment was given for the plaintiff. THIRKETTLE *againſt* REEVE, &c. Ante 68, 9.

NOTA. That afterwards the defendant upon this brought a writ of error in the exchequer-chamber, and this was aſſigned for error: and another error was aſſigned, that the plaintiff had ſued one as executor, jointly with the true executor, who was not executor; and ſo had failed in his ſuit.—But all the Juſtices held neither of them to be errors. For to the naming one executor who was not, this is not in abatement of the bill or writ, but only that he ſhall be barred againſt him; and it will be a great miſchief when divers are made executors, and one refuſeth, if the naming of him ſhould abate the writ. And to the other matter, they held it no error; for it was only a matter alledged by the defendants, and it appeareth not, whether it be true or falſe; and it is waived by the iſſue. And thereupon they all reſolved the judgment to be affirmed. In an action againſt two as executors, it is not error though one of them is not executor. Cowp. 832.

Elizabeth Mornington *againſt* Try and others. CASE 8.

EJECTIONE FIRMÆ. Upon not guilty pleaded, it was found, that the abbot of *St. Peter* of *Glouceſter*, 15. *Hen.* 8. being ſeiſed of the barn and tithes in queſtion, let them by deed under the convent ſeals to three for ſixty years; afterwards the abbey was diſſolved, and their poſſeſſions, *et inter alia* the barn and tithes, were given by ſtatute to the biſhop of *Glouceſter*; and afterwards, 15. *Eliz.* *John Wakeman*, biſhop of *Glouceſter*, let them to three *Cheynies* by indenture, rendering the ancient rent, for three lives; and the indenture was found *in hæc verba*; and in the end of it the confirmation of the dean and chapter was recited, which was of a leaſe made by *Rich. Wakeman*: but the jury did not *in facto* find that the dean and chapter did confirm it; nor found their deed *in hæc verba*, as they ſhould have done, but only recited it as a thing annexed to the indenture; and found expreſly the leaſe made to the huſband of the plaintiff by the now biſhop.—TANFIELD prayed judgment for the plaintiff; for the leaſe by *John Wakeman* was merely void, for there were twelve years to come of the ancient leaſe, ſo it muſt paſs by grant of reverſion; and no attornment is found; and the jury do not find a confirmation by the dean and chapter; and the confirmation reciteth a leaſe by *Robert Wakeman*, when it was by *John Wakeman*; and theſe laſt

A ſpecial verdict cannot be amended by the notes of the officer of the court, after it is returned to the ſuperior court. Poſt. 153. *Sed quære.* Cro. Jac. 185. Salk. 47. 53. Cro. Car. 338. Wilſ. 33. Bunb. 283. Stra. 1197. Carth 506. 1. Burr. 383. Cowp. 841. Dougl. 376. 30. 746. 1. Term Rep. 141. Co. Lit. 3. a. Co. 11. 21. a.

MORNINGTON *againſt* TRY AND OTHERS.

laſt faults were held to be incurable.—COKE moved, that the verdict ſhould be amended; for the note given to the clerk of the aſſiſes was, that they intended to find the confirmation expreſly, and of a leaſe made by *J. W.* And for the other point, tithes paſs without attornment.—But THE COURT held clearly, that after verdict returned in court, this cannot be amended by any ſuch ſuggeſtion; for then all verdicts may be prayed to be amended. But if any miſpriſion was, ſuggeſtion ought to be made of it before the verdict returned; but now it was too late: wherefore judgment was given for the plaintiff.

Poſt. 150.

CASE 9.

Richard Jackſon *againſt* Robert Mordant.

Michaelmas Term, 29. & 30. *Eliz. Roll*

A declaration that huſband and wife were ſeiſed to them and the heirs of the huſband, and let to the plaintiff, and that the defendant obſtructed his water-courſe, is good; for the commencement of the wife's eſtate, being inducement only, need not be ſhewn.

Poſt. 132. 154 181.

Hutt. 102. Cro. Jac 52. Ld. Ray. 132. 5 Com. Dig. 193. (*a*) Dougl. 330. Cowp. 201.

ACTION UPON THE CASE. The plaintiff declareth, that whereas *Thomas Style* and *Margaret* his wife were ſeiſed to them, and the heirs of *Thomas*, of five acres of meadow lying near a river called *Weſtbury* river; and being ſo ſeiſed, by indenture let them to the plaintiff for one-and-twenty years, by force whereof he was poſſeſſed; the defendant ſuch a day, &c. erected a water-mill *ſuper et trans* the ſaid river; by reaſon whereof *obſtupavit* the water running in the ſaid river with his mill; ſo that the water from time to time yearly, after the erecting of the ſaid mill, overflowed the banks of the river in the ſaid five acres of meadow, and them *inundavit*; by which they became barren *et ſcirpoſæ*, to his damage one hundred pounds. And upon this declaration it was demurred in law, and argued this term.

The firſt exception was, Becauſe he counts that the *baron* and *feme* were ſeiſed to them, and the heirs of the *baron*, and ſheweth not how the eſtate began; for it was ſaid, it being a ſpecial eſtate, and but a particular eſtate in the *feme*, the commencement of it ought to have been ſhewn.—But THE JUSTICES held it well enough, being an action on the caſe by their leſſee (*a*); ſo that it is but a conveyance to the action, and the inheritance is in the *baron*.

Second exception. Becauſe he declares of a leaſe by huſband and wife by indenture, and ſheweth not that a rent was reſerved, and then it cannot be the leaſe of the *feme*.—But THE COURT held it clearly to be good; for it is the leaſe of the *feme* till ſhe diſagree; and the inheritance being in the *baron*, it ſhall be good againſt him and his heirs.

Third exception, that the life of the *baron* was not averred. *Sed non allocatur*, for the reaſon aforeſaid.—And the ſame term judgment was given for the plaintiff; and I was of counſel with the plaintiff.

CASE 10.

Thomas Broome *againſt* Robert Mordant.

Trinity Term, 30. *Eliz. Roll* 813.

A leaſe for years by huſband and wife of the wife's land is good during the coverture. Cowp. 201. Dougl. 53.

ACTION UPON THE CASE. The plaintiff declares, that *Thomas Style* and *Margaret* his wife were ſeiſed of a water-mill called *Weſtbury-mill*, *viz.* the ſaid *Thomas* in his demeſne as of fee, and the ſaid *Margaret ut de libera tenemento*; and being ſo

ſeiſed

BROOME *againſt* MORDANT.

feiſed, they and all thoſe whoſe eſtate they had in the ſaid mill, have had, time out of mind, &c. a water-courſe running in the river of *Weſtbury*, to a mill called *Innelley-mill*, in the county of *N.* to the ſaid *Weſtbury-mill*, and from thence *ſuper et trans* an acre of land of the defendant to a mill called *Mixbury-mill*, in the county of *Oxon*, and this without any erecting of any mill; and had, time out of mind, &c. the multure of divers inhabitants there of their corn, &c. and they being ſo ſeiſed, let the ſaid mill to the plaintiff, &c. by indenture, by which he was poſſeſſed, until the defendant erected a new mill upon the ſaid acre of land, *per quod obſtupavit aquam prædict' ita quòd molendinum prædict' ſuffocatum fuit*, ſo that the plaintiff loſt the profit of his mill from the firſt day of *July*, *&c.* until, &c. to his damage, &c. And hereupon it was demurred in law, and the ſame exceptions taken as in the caſe before, and ruled as before. Ld. Raym. 132.

And another exception was taken, for it is ſaid the *baron* was ſeiſed in fee, and the *feme* in her demeſne as freehold, but ſaith not of what eſtate, for her life, or for another's life.—2. Exception, becauſe the preſcription is alledged in the *baron* and *feme*, and the *feme* had only an eſtate for life, and ſo cannot preſcribe.—*Sed non allocantur.* For to the firſt, the plaintiffs needed not ſhew what eſtate they had, it being by way of conveyance. And to the ſecond, when the *feme* is jointly ſeiſed with her *baron* who had the fee, the preſcription may be alledged in both. *Et ſic adjudicatur.*

Ann Boocher *againſt* Ancel Samford.

CASE 12.

Hilary Term, 30. *Eliz.* *Roll* 188.

EJECTIONE FIRMÆ. Upon a ſpecial verdict, the caſe was this: *William Samford* was lord of the manor of *Stone-houſe*, within which manor there is a place known by the name of *Ebley*, in which is a houſe and ſix acres of land, to which tenement divers other lands throughout the whole manor were pertaining, and had been uſed with it by the ſpace of ſixty years, and had always paſſed by one grant, and under one rent (which was now in the hands of one *H. B.* copyholder of it); and the ſaid *W. S.* being ſo ſeiſed, deviſed that his brother *Tho. Samford*, after the death of the ſaid *H. B.* ſhould have the tenement with the appurtenances in which *H. B.* dwelleth in *Ebley*, for ſixty years, rendering 4 l. *per annum* (the ancient rent being 45 s.); but the houſe and the ſix acres were worth 5 l.; and, If upon all this matter the other lands which were uſed with the houſe, and are out of *Ebley*, paſs or not? was the queſtion.—COKE argued that all paſſed, for they were always paſſed by one grant, and under one rent; and they are here granted *per nomen tenement'*. And it is to be firſt conſidered how theſe words (wherein he dwelleth in *Ebley*) ſhall refer to the dwelling, or to the tenement. And as to that, he ſaid the words ſhall be referred *ut verba accipiantur aptè et in proprio ſenſu*, then (dwelleth) ſhall not be referred to land, but to the tenement, for a man cannot dwell in land; and relation ſhall always be *ut ſententia non impediatur*, and not to the laſt antecedent; and here he deviſeth the tenement with the appurtenances, which is all things belonging to it; and the lands out of *Ebley* were belonging to it. And it was adjudged in one *Batree's Caſe*, where one being ſick ſent for a ſcrivenor, and gave him inſtructions, that he deviſed

Deviſe of the tenement with its *appurtenances* in which *B.* dwelleth in *E.* will paſs land *appurtenant* although it lie out of *E.*

1. Leon. 34. 1. Roll. Abr. 613. Jones, 379. Cro. Car. 130. 447. 473. 4. Mod. 132. 1. Salk. 225. Hob. 171. Dyer, 376. b. 292. Cro. Jac. 34. Sav. 114. 3. Com. Dig. 443. Plowd. 210. Powel on Dev. 226. Cowp. 94. 363. 808. Dougl. 761. 763. Bro. Ch. Caſ. 127. Moor, 222. Cro. Car. 57.

Boocher *againſt* Samford.

his houſe and the land belonging to it; the ſcrivenor draws a deviſe of the houſe, *cum pertinentiis*; and it was adjudged that the land paſſed: alſo the rent is increaſed, and therefore his intent was to give all the land, and it was to his brother for his advancement. —Atkinson *contra*. He agreed that by a deviſe of the tenements all paſſed; but when he ſaith, in which *H. B.* dwelleth in *Ebley*, this ſheweth his intent that nothing ſhall paſs but what is in *Ebley*. A man granteth his manor in *D.* nothing paſſeth but what is in *D.* And it was adjudged in the exchequer, where the king granted the commandry of *Slevidge* in the county of *Radnor*, that if no part of it be in *Radnor*, yet it ſhall paſs; but if part be in the county of *Radnor*, and part in another county, nothing ſhall paſs but what is in *Radnor*.—But it was adjudged for the plaintiff, that the lands out of *Ebley* ſhall paſs; but that the plaintiff ſhall recover but two parts, the deviſe being void for the third part, the land being held in *capite*.

Case 12.

Croſſman *againſt* Reade.

If an executrix marry the debtor of her teſtator, the debt is only ſuſpended during the coverture; and upon the death of her huſband his executors are liable.

DEBT. The caſe upon ſpecial verdict was, A woman executrix marrieth with a debtor of the teſtator; the huſband dieth; and debt was brought againſt the woman, who pleaded *riens inter manes*, and all this was found; and, If this was aſſets? was the queſtion.—And it was adjudged that this was not aſſets in her hands; for, by the intermarriage, the debt which the executrix had *in auter droit*, was not *extinct* but *ſuſpended*; and the action was revived againſt the executors of the *baron*; and compared it to *Darcie's Caſe in the Commentaries*, *folio* 184.

Co. 8. 136. a. Moor, 236. 1. Leon. 230. 1. Roll. Abr. 934. 1. Sid. 79. Cro. Car. 373. Co. Lit. 264. b. 1. Salk. 306. Cowp. 375.

Case 13.

Richmond *againſt* Webb.

Judgment reverſed for the miſ-awarding the *venire facias*. Poſt. 146. 171. 260.

Cro. Jac. 86. Hob. 37.

ACTION UPON THE CASE. And counts that he was ſeiſed of a meſſuage and certain lands in *Blankeworth*, to which land, time out of mind, &c. he had common appendant in 400 acres of land in *Lydcotts Milliſen*; that the defendant had incloſed it, and ſo diſturbed him of his common. The defendant pleads that he had ſet up a Vaccary upon a parcel of it neceſſary, &c. absque hoc that the plaintiff had common. Upon this iſſue was joined, and tried for the plaintiff.—Tanfield moved in arreſt of judgment, that the *venire facias* and trial was *de Lydcotts Milliſen* only, whereas it ought to be alſo of *Blankeworth*, where the land was, 49. *Edw.* 3. *pl.* 20. 30. *Aſſ.* 42. 10. *Edw.* 4. *pl.* 10. and this miſ-trial is out of all the ſtatutes of *jeofailes*.—And for this cauſe it was adjudged that the plaintiff *nihil capiat per billam*; and he could not have a *venire facias de novo*, for he had a verdict given, which was certified (*a*).

(*a*) See 21. Jac. 1. c. 13. 16. & 17. Car. 2. c. 8. 4. & 15. Ann. c. 16. and 24. Geo. 2. c. 18. Poſt. 260.

Case 14.

Martin *againſt* Alice Whipper.

If a perſon cancel a bond in which the inteſtate was bound to another, and gives his own bond for the ſame ſum, this is in the nature of a payment, and may make him executor *de ſon tort*.

DEBT againſt the defendant as executrix of *J. S.* Upon *plene adminiſtravit* pleaded, it was found by verdict, that the teſtator at the time of his death had goods to the value of one hundred pounds, and was bound to another by obligation in one hun-

dred pounds, and that the defendant had taken in this obligation, and made another in her own name with ſureties to the obligor. —And upon the motion of HEALE, the Court held this was an adminiſtration, and it is in the nature of a payment, and ſo much of the teſtator's debt is by this diſcharged; and ſo it was ſaid to be adjudged in *Wood's Caſe*.—NOTA. It was ruled accordingly, *Eaſter Term*, 30. *Eliz.* which was entered, *Mich.* 28. & 29. *Eliz. Rot.* 2625. *inter Stampe et Hutchins.*

MARTIN *againſt* WHIPPER. 5. Co. 33. Dyer, 105. 166. Bendl. 73. 1. Mod. 14. 1. And. 11. 4. Bac. Abr. 269. 2. Term Rep. 97. 587. 597.

CASE 15.

Pigott *againſt* Ruſſel.

Hilary Term, 30. *Eliz. Roll* 164.

PIGOTT ſued two writs of error; one to reverſe a fine; the other to reverſe a common recovery, by reaſon of his nonage. —TANFIELD moved that the writ to reverſe the fine was not well brought. The caſe was, *Engliſh* was tenant for life in right of his wife, the remainder to the plaintiff in fee, and they joined in a fine to *Ruſſel*; ſo they all ought to join in the writ, and there ought to be ſummons and ſeverance, and he cannot bring it alone. —COKE and ATKINSON *contra*. This writ is well brought by the plaintiff alone, for it is brought for an error *in fait*, *viz.* his nonage, and of his nonage the other can take no advantage; ſo the cauſe of the action being ſeveral and not joint, they cannot join in the action, 34. *Hen.* 6. in the caſe of attaint, 7. *Hen.* 4. *pl.* 44. and they relied upon the caſe 29. *Aſſ.* 14.—THE COURT held the writ was well brought, becauſe it is no error in the record, but an error *in fait*; and if two infants bring a writ of error, they muſt aſſign the errors ſeverally; and therefore if one be within age, he muſt bring the writ alone (*a*).

If a tenant for life and an infant in remainder join in a fine, the infant may bring a writ of error alone. Poſt. 129. 1. Co. 76. b. 1. Leon. 317. 1. Strange. 234. Cruiſe on Fines, 290. 3. Burr. 1805. 1. Ter. Rep. 86.

(*a*) It was moved again, and the fine was reverſed *quoad* the infant only. Poſt. 124.

CASE 16.

Reynold *againſt* Kingman and Brown.

Hilary Term, 30. *Eliz. Roll* 343.

EJECTIONE FIRMÆ. The caſe was, *H. Creeke*, who was ſeiſed of certain lands held by knight's ſervice, let the ſame to *J. Creeke*, HABENDUM to him and one *Jo. Downeman*, for their lives, rendering rent; and afterwards deviſed the land to *Alice* his wife for life, the remainder over in fee, which was void for a third part, and died. *J. Creeke* the leſſee died. *Jo. Downeman* pretending to be in as leſſee, continueth in poſſeſſion, and pays the rent to *Alice*. Afterwards one *Edward Creeke*, ſon and heir of the deviſor, maketh a letter of attorney to *J. S.* to enter into all the land, and to enfeoff the ſaid *Jo. Downeman*, who maketh a feoffment accordingly. *J. Downeman* dieth ſeiſed. The queſtion was, If this diſcent takes away the entry of *Alice*? —HARRIS argued that it did not, for when he enters and pays the rent to the deviſee, he doth it as tenant at will, for he had colour to enter. And it was adjudged in this court, in a caſe between *Goos and others*, that where *J. S.* giveth an authority to *J. D.* to make leaſes of certain land, to certain perſons, in the name of *J. S.* and *J. D.* maketh leaſes in his own name, which was void; yet although the leſſees enter and die ſeiſed, this taketh not away the entry of *J. S.* for they enter by colour of title, and in the mean time are as tenants at will; and when the attorney of *Ed-*

What diſcent ſhall toll an entry. Ante 56. Poſt. 323. 615. 641.

3. Bac. Abr. 408.

REYNOLD *againſt* KINGMAN and BROWN.

ward Creeke enters to make a feoffment, the other was in poſſeſſion for his leſſor, 38. *Hen.* 6. and then cannot take livery from him that had no poſſeſſion.—But WRAY, C. J. ſaid he could not be tenant at will; for he had no colour to enter, his name in the *habendum* being void; but if he were tenant at will, by his taking a feoffment of a ſtranger his will is determined; and ſo his entry cannot reduce the poſſeſſion to *Alice*. *Quâcunque viâ*, this is a deſcent, and *tolls* the entry: and it was adjudged accordingly.

Poſt 323.

CASE 17.

Knight *againſt* Bourne.

Judgment in *trover* reverſed. Cro. Jac. 681. Ld. Ray. 191. 1. Ter. Rep. 783.

ACTION upon trover of a horſe. The judgment was, "*quòd* "*recuperet equum vel damna*," whereas it ſhould be "*damna*" only; and the judgment was reverſed.

CASE 18.

Beveridge *againſt* Cony.

Eaſter Term, 30. *Eliz.* *Roll* 285. *or* 485.

Plea of payment *generally* to debt for rent, on a leaſe made at one place of land lying in another is good, after a verdict where the leaſe was made. Poſt. 259.

7. Co 2. a. Ld. Raym. 111. Dougl. 683.

ERROR of a judgment in the common pleas. The matter was, a leaſe was made at *Northampton*, of land in *Cambridgeſhire*; the leſſee was obliged to perform the covenants contained in the indenture of leaſe; debt brought upon the obligation, and the breach aſſigned in not paying the rent: the defendant rejoined that he had paid it. Upon this they were at iſſue; and found for the plaintiff by an enqueſt of the county of *Northampton*, where the leaſe was made.—It was ſaid in arreſt of judgment that it was no good iſſue, becauſe no place is alledged of payment, and the iſſue was miſ-tried by a *viſne* of the county of *Northampton*, whereas it ought to be of the county of *Cambridge* where the land was, for by intendment the payment was there. And ſo was the opinion of ANDERSON. But WYNDHAM, PERIAM, and RHODES *contra*. For although the bar was ill, becauſe no place of payment was alledged, yet by the verdict it is made good, for a payment in one place is payment in all places; and it was adjudged there for the plaintiff.—Upon the writ of error brought, theſe two matters were aſſigned for error. *Vide* 45. *Edw.* 3. *pl.* 5. But afterwards the judgment was affirmed.

CASE 19.

Lancaſter *againſt* Lowther.

Trinity Term, 30. *Eliz.* *Roll* 346.

An outlawry reverſed for the variance of a letter. Ante 50.

ERROR to reverſe a judgment in outlawry.—1. Error aſſigned, that the original was againſt *Brian Lancaſter*, *de Hutton Walmſley* in the county of *York*. The proclamations were againſt *Brian Lancaſter*, *de Hutton*, leaving out *Walmſley*.—2. There are in the proclamations two letters of *t*, and in the original but one, *viz.* *Huton*: and the judgment was reverſed.

CASE 20.

Auſten and Steene *againſt* Courtney.

The word "*tenement*" is too uncertain for a fine.

11. Co. 55. a. 1. Leon. 188. Owen, 93. 1. Sid. 340.

ERROR to reverſe a fine levied in *Exeter*, upon a plaint in nature of a writ of covenant.—1. Error aſſigned. That the plaint was *quòd teneat conventionem de duobus tenementis in Exeter* (and abutted them on every ſide), which is incertain, for "*tenement*" contains divers things, as rent, land, meadow, &c. as an *ejectione firmæ* of a tenement, and an indictment that one entered *in tene-*

Mad. Exch. 145. March. 96. 2. Roll. Abr. 80. 1. Term Rep. 11.

mentum

mentum with force, are not good; and this error was assigned in the plaint; for the fine relates to the covenant, and is levied *de tenementis prædict.*—2. Error. The fine levied in *Exeter* is void, for they cannot prescribe to levy fines, for then the queen should lose her fine *pro licentiâ concordandi*, 50. *Ass.* 9. 44. *Edw.* 3. *pl.* 29. & *in* 22. *Eliz.* it was ruled in a *Chester* case, that a fine levied there was void.—The judgment was reversed; but THE JUSTICES delivered no opinion whether a fine levied in *Exeter* was good or not.

AUSTEN and STEENE *against* COURTNEY.

Qu. If a corporation can prescribe to levy fines? Post. 314.

Edwards *against* Ebsworth.

CASE 21.

INFORMATION. Upon the statute 35. *Hen.* 8. c. 17. for not fencing of coppices.—1. Exception. Because it is not alledged that the defendant had lawful interest in them, as the words of the statute are.—2. Because it is shewn that certain coppices were cut, but shews not what coppices they were.—3. Because it is recited that he shall forfeit for every rood 3s. 4d. whereas it should be for every *rod* of land.—But it was said the parliament roll is *rood* of land, and so was the last impressions; but for the two first exceptions the party was discharged.

Information quashed for uncertainty.

Pike *against* Cottington.

In the Exchequer Chamber.

CASE 1.

ERROR of a judgment in the queen's bench, in debt upon an obligation. The error assigned was, The defendant in the writ of error brought debt upon an obligation of 100l. The condition was, that if he pay 50l. at his house AT *Lockington*, in the parish of *Kilmerston*, that then, &c. The defendant pleaded payment, and the *venire facias* issued of the *visne* of *Lockington*.—And this was assigned for error; for it ought to be *de visneto de Kilmerston*; for *Lockington* shall not be intended to be a village, but a place known in *Kilmerston*. 6. *Hen.* 7. *pl.* 3. 11. *Hen.* 7. *pl.* 22. —But all THE JUSTICES held it no error, for *Lockington* shall be intended to be a village in the parish of *Kilmerston*, for divers villages may be in one parish; but if it had been at his house IN *Lockington* IN *Kilmerston*, then *Lockington* shall not be intended a village, but a place known in *Kilmerston*: and the judgment was affirmed.

Visne.

Ante, 108.

Co. 11. 25. b.

Kingdon *against* Barne.

CASE 2.

ERROR of a judgment in the queen's bench, in trespass for taking of certain corn. The defendant justifieth the taking as his proper goods; and pleads a special justification. The plaintiff makes title to them by seisure, for that king *Philip* and queen *Mary*, by their *letters patents* enrolled in chancery, *dederunt et concesserunt villæ de Launceston* liberty of a market, &c. and shews a special cause of seisure, as an officer there; upon which it was demurred in law, and judgment for the plaintiff.—And the error assigned was, that he pleaded that the king and queen by letters patents, grant, &c. but saith not *sub magno sigillo confectas*. And this was clearly held an error; for if the grant was not under

Letters patents must be pleaded under the GREAT SEAL. Ante, 75.

10. Co. 94. b. 1. Term Rep. 149.

KINGDON *againſt* BARNE.

the great ſeal, it is not good, and though he ſaith enrolled in chancery, it is not good, for any patent may be enrolled there; and therefore the judgment was reverſed.

CASE 3.

✱ Bury *againſt* Pope.

An action for a nuſance does not lie for ſtopping another's lights, though they have continued for forty years. Poſt. 269.

CASE for ſtopping of his light.--It was agreed by all THE JUSTICES, that if two men be owners of two parcels of land adjoining, and one of them doth build a houſe upon his land, and makes windows and lights looking into the other's lands, and this houſe and the lights have continued by the ſpace of thirty or forty years, yet the other may upon his own land and ſoil lawfully erect an houſe or other thing againſt the ſaid lights and windows, and the other can have no action; for it was his folly to build his houſe ſo near to the other's land: and it was adjudged accordingly.

11. Hen. 4. 47. 1. Ro Ab. 107. 9. Co. 58. b. 1. Lev. 162. 122. 1. Sid. 167. 1. Vent. 237. Cro. Jac. 159. 2. Vern. 646. Ld. Raym. 392. Salk. 453. 3. Bl. Com. 217.

NOTA. *Cujus eſt ſolum, ejus eſt ſummitas uſque ad cœlum. Temp. Ed.* 1.

CASE 4.

Bilford *againſt* Fox and his Wife.

In debt on bond againſt a huſband and a wife executrix, the huſband on the exigent ſhall put in an appearance, attorney, and *ſuperſedeas* for himſelf *and his wife.*

DEBT upon an obligation againſt the defendant and his wife, executrix of her former huſband. The *baron* appeared upon the exigent, and would have put in a *ſuperſedeas* for himſelf alone, without any appearance or *ſuperſedeas* for his wife; and ſo at the firſt THE JUSTICES thought he might, as 18. *Edw.* 4. & 14. *Hen.* 6. are. But *Antropos*, the attorney, ſaid it was a practice to defeat the plaintiff of his debt, and ſhewed a precedent of 18. *Eliz.* that in the like action brought againſt *Somers* and his wife, *Somers* would have put in a *ſuperſedeas* for himſelf only; but he was not ſuffered, but ſhall be compelled to put in an appearance, attorney, and *ſuperſedeas* for his wife alſo. And ſo all THE JUSTICES did now hold; otherwiſe an exigent *de novo* ſhall iſſue out againſt him.

1. Roll. Abr. 580. 583. 1. Leon. 138. Hob. 179. Cro. Car. 58. Stra. 1272.

CASE 5.

Hunt *againſt* Sone.

Hilary Term, 30. Eliz. Roll 1732.

On a promiſe to pay ſo much a year for a certain number of years, in conſideration of occupying lands, ſeveral actions lie upon every non payment.

AN ASSUMPSIT. And declared, that in conſideration he promiſed the defendant that he ſhould have and occupy ſuch lands, from ſuch a day, for five years, the defendant promiſed to pay him 20 l. for every year, at two feaſts, &c. and avers that the defendant had occupied the land for one year and a half, and for 30 l. due for that time he brought action: and after verdict, it was moved in arreſt of judgment, that this promiſe and conſideration was a thing entire, and not ſeverable; and therefore ought to have averred that the defendant had enjoyed the land for five years, otherwiſe the action lieth not.—But it was adjudged for the plaintiff; for all THE COURT held, that if the promiſe had been that he ſhould enjoy the land for five years, and in conſideration thereof he ſhall pay him 100 l. in five years, *viz.* 20 l. *per annum*, there the action lieth not for part till all the term be expired; but the promiſe and agreement being that 20 l. ſhall be paid for every year, it is otherwiſe; and ſeveral actions lie for every day of payment. And RHODES, *Juſtice*, ſaid, ſo it was lately adjudged in *Sir Thomas Joſcelyne's Caſe*, that in conſideration one would marry his daughter, that he will pay to him 300 l. *ſcilicet*, fifty pounds by the year during

Cro. Jac. 598. Cro. Car. 241. Moor, 13. 1. Ro. Ab. 29. 2. Saund. 337. 2. Leon. 107. Co. Lit. 292. b. Poſt. 776. 807. Andrews, 370.

six years, there at the end of every year a several action lieth for fifty pounds.

HUNT *against* SONE.

Rookesby's Case.

CASE 6.

QUARE IMPEDIT. The original writ wanted this word, "*ad*;" for whereas the writ should be, *quæ ad donationem suam spectat*, the writ was, *quæ donationem suam spectat*; and after divers motions for amending it, the writ by award was amended, and "*ad*" put in: and the principal reason was, that the six months were passed, and if the writ should abate which was purchased within the six months, the plaintiff should be remediless to recover his presentation.

A *quare impedit* may be amended where the abatement of it would cause defect of justice. Ante 79. Post. 286. 462. 634. 8. Co. 159.

1. Com. Dig. 318. Cowp. 229. Dougl. 116. 1. Term Rep. 237. 782.

Albany *against* The Bishop of St. Asaph.

CASE 7.

Trinity Term, 27. Eliz. Roll .

QUARE IMPEDIT, for the church of *Whittington*. The bishop pleaded that the service there was in the *Welch* tongue, and that the parishioners understood not the *English*, and that the presentee could not speak *Welch*; and therefore he refused him.— And all THE JUSTICES held this a good cause of refusal, for he cannot instruct his flock according to his duty and charge. But in this case the plaintiff had presented sixteen days within the six months, and the bishop gave no notice of the inability of the clerk, till three days after the six months expired. And the Court held, that notice ought to be given to the patron himself, if he be resident in the county; and if not, a public intimation ought to be on the church-door; and notice of this matter ought to have been given immediately when he was presented and examined, or within such convenient speed as might be; but when the bishop is to enquire of the behaviour of the clerk, he shall have longer time. And for this cause judgment was given for the plaintiff.

If a benefice be in *Wales*, and the clerk does not understand *Welch*, the bishop may refuse him, but he must give notice of it to the patron. 1. Leon. 31. Ld. Ray. 192. 3. Com. Dig. 212. 2. Salk. 539.

Shepard *against* Kearne.

CASE 8.

DEBT upon an obligation. The condition was, that if one pay to the plaintiff within one month after the death of *Lady Learne* 30l. or twenty kine, at the election of the obligee, that then, &c. The defendant pleads, that the plaintiff had made no election. The plaintiff demurred; and it was adjudged that the bar was good; and judgment against the plaintiff.

Where one of two things are to be performed by the obligor at the election of the obligee, "*no election*" is a good bar to debt on the bond.

The Queen *against* The Bishop of Lincoln, and Ligh *the Incumbent*.

CASE 9.

QUARE IMPEDIT. The case was, After lapse incurred to the queen, the bishop being patron doth present, and afterwards the successor of the bishop certifieth against this incumbent, that he had refused to pay the tenths, and then the bishop collat-

If a church becomes void by the act of the incumbent, and the patron presents and dies,

yet the king shall not lose his presentation. Owen, 5. 89. Gouldf. 78. 83. 86. Moor, 259.

THE QUEEN *against* LINCOLN and LIGH.

eth the defendant, who was inducted; the queen brings *quare impedit*.—And it was adjudged that the queen hath not loſt her preſentation; but if the incumbent had died, it were otherwiſe: for here the church became void by the incumbent's own act; ſo if he had reſigned or been deprived; and it would be inconvenient if the queen ſhould loſe her preſentment by the incumbent's own act.

Ante 44. Co. 7. 28. a. Poſt. 790. 811.

CASE 10.

Michael *againſt* Scockwith.

A bond cancelled after iſſue joined, may be given in evidence as the defendant's deed.

Co. 5. 119. b.

DEBT upon an obligation. The iſſue was, *non eſt factum*. The jury found that the defendant did ſeal and deliver it as his deed, but that after the day of the iſſue joined, the ſeal was pulled off from the obligation.—And the plaintiff had judgment; for it was the defendant's deed at the time when the iſſue was joined, and the trial ſhall relate to it, although the deed was cancelled afterwards. *Vide* 36. *Hen.* 8.

CASE 11.

May and Banniſter *againſt* Street.

Lands out of a borough cannot be holden in *libero burgagio*.

S.C. Moor, 257. Co. Lit. 109. 111.

EJECTIONE FIRMÆ. It was found by verdict, that the prior of *Merton* was ſeiſed of a houſe in *Southwark*, held of the archbiſhop of *Canterbury*, as of his borough of *Southwark*, and 30. *Hen.* 8. ſurrenders it to the king, *Henry* the eighth, who granted the ſaid meſſuage and divers other lands in *London*, *Middleſex*, and *Eſſex*, to *J. S.* and his heirs, to hold of him *in libero burgagio* by fealty for all ſervices and demands, and not *in capite*. Queen *Mary* grants the manor and borough of *Southwark* to the mayor and commonalty of *London*, and the tenant of the ſaid meſſuage died without heir. The queſtion was, Whether the now queen or the patentees of the borough ſhould have the eſcheat? —And it was adjudged for the queen: for the firſt patentee of the meſſuage held it of the queen, in ſocage *in capite*, as of a ſeigniory *in groſs*, and the words *in libero burgagio* are merely void, for the land out of the borough cannot be holden *in libero burgagio*; and there ſhall not be ſeveral tenures, for one tenure was reſerved by the king for all, and therefore of neceſſity it ſhall be a tenure in ſocage of the king.

CASE 12.

Stampe *againſt* Hutchins.

Michaelmas Term, 28. & 29. Eliz. Roll 2625.

If a perſon call in a bond of an intestate, and give their own bond for part of the ſum with a promiſe to pay the remainder, it is an adminiſtration of the inteſtate's effects.

Ante 115. 1. Leon. 111. Moor, 260. 5. Co. 33. 2. Term Rep. 97. 587. 597.

DEBT againſt the defendant as adminiſtratrix. She pleaded *plenè adminiſtravit*. The jury found that the inteſtate was indebted to divers by obligations, and that after his death the defendant had taken in the obligations, and had obliged herſelf to pay the greater part of the ſums contained in the obligations, at certain days to come, and for the reſidue had promiſed to the parties, that in conſideration of delivery in of the ſaid obligations, that ſhe would pay, &c.—And by the opinion of ANDERSON, C. J. WYNDHAM and PERIAM, it was held clearly a good adminiſtration, ſo that the property of the goods of the inteſtate to that value, were altered and changed in the defendant.

Hunt

Hunt and his Wife *againſt* Gilburne. *

CASE 13.

DOWER. And demanded the third part of the lands of *Auguſtine* her former huſband, in *Kent*. The defendant pleaded that the cuſtom there is, that the wives ſhall have the moiety of the lands of their huſbands for their dower, and ſhall hold them ſo long as they live chaſte and unmarried, *et non ſecundum curſum communis legis*; and that the *feme* ſince the death of her former huſband, had taken the demandant *Hunt* to huſband; and ſo demanded judgment, if ſhe ſhall have dower.—The opinion of THE COURT was, that the preſcription in the bar was good, being in the negative; and ſo it was adjudged.—PERIAM ſaid, if he had not pleaded in the negative, yet the demandant ſhall not have dower; for the cuſtom that wives ſhall have the moiety is the common law in *Kent*, and no other law runs there.

By the cuſtom of gavelkind a wife ſhall be endowed of a moiety *ſo long as ſhe lives chaſte and unmarried*; and ſhe muſt take it by the cuſtom. Poſt. 825.

S.C. Gould. 108. 1. Leon. 133. Moor, 260. Sav. 91. F. N. B. 150. Cro. Car. 562.

1. Sid. 77. Co. Lit. 33. b. and Mr. Hargrave's note [10]. Rob. on Gav. 160. Cowp. 481.

Hughſon *againſt* Ann Webb.

CASE 14.

Eaſter Term, 30. *Eliz. Roll* 420.

DEBT againſt the defendant as adminiſtratrix upon *a contract* of the inteſtate. The defendant pleads fully adminiſtered, and found againſt her. It was moved in arreſt of judgment, that debt upon a contract lieth not againſt an adminiſtrator.—And it was reſolved by all THE JUSTICES, that the plaintiff ſhall not have judgment; for although the defendant by her plea admitted that the action lay againſt her, yet when the matter at the beginning is not ſufficient to charge her, the Court *ex officio* ought to abate the writ, without exception of the party, 15. *Edw.* 4. *pl.* 25. and the defendant's plea takes not away the authority of the Court, but they may abate the writ at any time after. 1. *Sid.* 333. *contra*.

Debt does not lie againſt an adminiſtrator upon *a contract* of the inteſtate, and the Court will abate the writ after verdict. Poſt. 426. 454.

Sed vide Vaugh. 94. 101. 9. Co. 87.

10. Co. 77. 1. Lev. 200. Cowp. 371.

Everard *againſt* Greene.

CASE 15.

TRESPASS. The writ ſuppoſed the treſpaſs to be done *apud Heniſale*, and the declaration ſuppoſed the treſpaſs to be *apud Bayſkett* in *Heniſale*; and after verdict this variance was alledged in arreſt of judgment: SNAGG *for the plaintiff*; FRANCIS GAWDY *for the defendant*.—THE COURT held, that for this variance judgment ſhould be ſtayed; and the difference is, where there is no original, it is aided by the 18. *Eliz.* c. 14. for jeofails; but where there is an original, and this varies from the declaration, it is otherwiſe; and a precedent in the queen's bench was ſhewn to be adjudged accordingly.

Where there is no original, the defect is aided by the ſtatute of jeofails; but not where there is a bad original. Ante 119. contra. Poſt. 722.

1. Mod. 3. 1. Sid. 423. 2. Keb. 544. 583.

1. Saund. 317. Yelv. 108.

Stevens *againſt* Lawton and his Wife.

CASE 16.

Michaelmas Term, 29. & 30. *Eliz. Roll* 2578.

EJECTIONE FIRMÆ. Upon ſpecial verdict the caſe was, *Sampſon Bell* let land to *W.* his ſon, and *P.* his wife, *et eorum*

Iſſue after-born cannot take by a grant to *A.* and *B. et eorum primogenitæ prolis ſucceſſivè*. Ante 10. 58. Poſt. 334. Moor, 103. Plow. 29. b. 2. Roll. 417. 1. Roll. Rep. 325. Owen, 152. 64. Vide Harg. Co. Lit. 9. a. note [3]. and 20. b. note [2].

primogenitæ

STEVENS *againſt* LAWTON and his WIFE.

primogenitæ proli ſucceſſivè; they had then no iſſue, but afterwards they had iſſue: the queſtion was, If after the death of *W.* and *P.* the iſſue ſhall take by way of remainder or otherwiſe?—And THE COURT held, he ſhall take nothing, for he was not *in eſſe* at the time of the grant, and by the grant he is to take jointly: and ſo it was adjudged.

CASE 17.

Chamberlain *againſt* Stanton.

Michaelmas Term, 30. & 31. *Eliz. Roll* 656.

A deed is not executed until it be *formally* delivered. Ante 7.

Harg. Co. Lit. 36. a. note [b]. Owen, 95. Dyer, 192. in marg. 1. Term Rep. 86.

DEBT upon an obligation. The defendant pleaded *non eſt factum*. The jury find that the defendant cauſed the obligation to be written, and ſigned, and ſealed it; and then laid it upon a table, and the plaintiff came and took it. The queſtion was, If this was the defendant's deed?—The opinion of all THE JUSTICES was, that it was not, without other circumſtances found by the jury.

CASE 18.

Johnſon *againſt* Gabriel and Bellamy.

Trinity Term, 29. *Eliz. Roll* 334.

A fine levied by a deviſee in fee in remainder, before he attains the age at which the deviſe veſts, will bar his heir. Poſt. 142. 362. 610.

S. C. 10. Co. 50. S. C. 2. Leon. 36. Cro. Car. 435. Shep. Touch. 25. Cruiſe on Fines, 165.

EJECTIONE FIRMÆ. The caſe upon ſpecial verdict was, *Grant* was ſeiſed in fee of the land, and deviſed it to his wife for life; and when *John Grant*, the ſon of his brother, came to his age of twenty-five years, then he ſhall have it in fee. *John*, before his age of twenty-five years, levieth a fine to *A. B.* and after his ſaid age of twenty-five died.—And it was adjudged that his heir ſhall be barred by this fine levied by him, and ſo it ſhall be if the land had been given to him in tail, and there ſhall be no averment, that *partes ad finem nihil habuere*, &c. And this being found by verdict, ſhall bar as well as if it had been pleaded as an eſtoppel (*a*).

(*a*) *Sir Edward Coke* ſays that no judgment was entered in this caſe; but this is contradicted by the report of it in 2. *Leonard* 36. And it is cited in *Raym.* 150. as adjudged that this eſtate in contingency was barred by force of the words of 32. *Hen.* 8. c. 36.

Hilary

Hilary Term,

35. Eliz. In the Queen's Bench,

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Mott *againſt* Hales.

CASE 1.

Michaelmas Term, 30. & 31. *Eliz. Roll* 562.

DEBT upon leaſe for years. The caſe was, A parſon maketh a leaſe to the plaintiff for twenty-one years, after the 13. *Eliz.* c. 20. of lands uſually let, rendering the ancient rent. The patron and ordinary confirm the leaſe. The leſſee lets part of the term to the defendant. The parſon dieth. The ſucceſſor enters, and lets it to the defendant, againſt whom the firſt leſſee brought debt upon the former leaſe, who pleads the 13. *Eliz.* c. 20. that makes all leaſes void, where the parſon is non-reſident or abſent for eighty days, &c. and that the ſucceſſor hath entered, &c.—Upon this plea the plaintiff demurred; and it was argued by COKE and GODFREY, that the ſtatute extends not but to the parſons that make the leaſes and are non-reſident or abſent, &c. and extends not to leaſes of parſons which afterwards die; for ſuch perſons cannot be ſaid to be abſent which are not *in eſſe*, eſpecially the ſtatute giving liberty to let land uſually let, which ſhall be vain, being confirmed by the patron and ordinary, if they continue no longer than the parſon's life.—But it was adjudged that this leaſe is void by the death of the incumbent; for THE JUSTICES ſaid, that the ſtatute doth provide againſt dilapidations, and for maintenance of hoſpitality; and therefore provideth not only that leaſes ſhall be void for non-reſidency, &c. but by death or reſignation, for otherwiſe dilapidations ſhall be in the time of the ſucceſſor, and he cannot maintain hoſpitality: and ſo it was adjudged.

The death of a parſon is *a non-reſidency* within the meaning of 13. Eliz. c. 20. ſo as to avoid his leaſes. Poſt. 490. Moor, 270. Sed vide 2. Lev. 61. 1. Vent. 244. 3. Keb. 46. 107. 193. 3. Bac. Abr. 396. 371. contra. Cowp. 129. 429. 2. Term Rep. 749.

Barkly and Gibbs *againſt* Kempſtow.

CASE 2.

Trinity Term, 30. *Eliz. Roll* 64.

ASSUMPSIT. Plaintiffs declare, that *civitas Worceſter fuit antiqua civitas*, and that all pleas determinable there were uſed to be by ſuit before the bailiffs, chamberlain, and aldermen there determined, and the bailiffs, &c. had uſe to have their *ſervientem ad clavam*, to make arreſts; and that there they had a priſon, and

In an action for an eſcape it is not neceſſary to ſtate that the warrant was under ſeal, or that the plaintiff was damnified. Ante 53. Poſt. 625. Hob. 14. 3. Wilſ. 268. Cowp. 63. 2. Term Rep. 5.

that

BARELY and GIBBS *againſt* KEMPSTOW.

that the bailiffs time out of mind were keepers of the priſon, and of all the priſoners there: and that whereas the defendant had a houſe adjoining to the priſon, in which the bailiffs had uſe to commit their priſoners to be ſafely kept; and whereas one *M.* had affirmed a plaint of 18l. againſt *Worſley* in the ſame court before the bailiff, &c. which was a plea there determinable by cuſtom, *per quod* they *mandaverunt quoddam warrantum* to the ſaid ſerjeant to arreſt him, by force whereof he arreſted him and brought him to the next court, and the plaintiffs being bailiffs committed him to priſon; and the defendant having the ſaid houſe adjoining to the priſon, in conſideration that the plaintiffs committed the priſoner to him to keep, by which he might make his commodity, by uttering his meat and drink, and might have as great benefit as he uſed to have, promiſed to keep him ſafely, and ſave the plaintiffs harmleſs of all eſcapes; whereupon they committed the priſoner to his houſe to keep, &c. he ſuch a day had ſuffered him to eſcape, by which they were damnified. Upon *non aſſumpſit* pleaded, it was found for the plaintiffs, and divers matters alledged in arreſt of judgment.—1. Becauſe it is alledged that *mandaverunt warrantum*, &c. but ſhew not that it was in writing under ſeal, as it ought to be. *Sed non allocatur*, for it ſhall be ſo intended.—2. It was not alledged how they were damnified, *viz.* that they were ſued for this eſcape, or otherwiſe moleſted. *Sed non allocatur*, for immediately upon the eſcape they were damnified and in danger to be ſued, and might ſue the defendant preſently, and not tarry till they were ſued.

Conſideration in *aſſumpſit*.

It was held upon good adviſement, that this was a good conſideration to make an *aſſumpſit*, *viz.* the uttering of his meat, &c.

2. Burr. 925, 926.

CASE 3.

Pigot *againſt* Ruſſel.

Vide Ante, page 115. *Caſe* 15.

If leſſee for life and an *infant* reverſioner join in a fine, *he* may reverſe it for *nonage*, but he cannot enter for the forfeiture. Ante 115. Poſt. 129. 290. 1. Co. 76. b. 2. Leon. 317. Hob. 278. 2. Leon. 108. Moor, 565. 1. Wood's Con. 84. 3. Burr. 1794. Cowp. 702. 1. Term Rep. 86.

IT was moved by TANFIELD, that the writs of error were not good, for the writ of error upon the recovery made only mention of one voucher, when it was a double voucher; ſo the Juſtices had no warrant to examine it. 1. The writ of error upon the fine was ill, for the writ makes mention of an hundred and five acres, and for this variance it is not good.—ATKINSON and COKE *contra*. 1. The writ of error upon the recovery was well enough, for ſo are all the precedents to make mention of one voucher being betwixt the defendant and tenant; but if it had been between the firſt and ſecond vouchee, then both ought to be mentioned. And as to the fine, it agreeth with the record, which is with the *cuſtos brevium*.—But WRAY, C. J. ſaid, the principal part of the fine is with the *chirographer*, and it ought to agree with it, elſe it is not good. And here it was held that if leſſee for life and he in the reverſion join in a fine to a ſtranger, and the reverſioner reverſeth the fine for nonage, yet he ſhall not enter for forfeiture, becauſe he joined in the fine and conſented to it: and afterward the fine was reverſed *quoad* the infant only.

Patridge's

Patridge's Caſe.

CASE 4.

QUO WARRANTO. A demurrer to the bar. It was held by all the Juſtices in ſpeaking to it, that a man may preſcribe to hold a leet oftener and at other times than are mentioned in MAGNA CHARTA, *cap.* 11. for it is in the affirmative.

How often a *leet* may be held, &c. Poſt. 245. S. C. Leon. 212. 2. Inſt. 72. 2. Hawk. P. C. 90. 5. Com. Dig. 160.

POPHAM ſaid, that want of a pillory or tumbrel is cauſe of forfeiture of a leet (*a*). 3. *Edw.* 1. "*Leet*" 12.—COKE *contra.* (*a*) 2. Hawk. 114

POPHAM ſaid, that a general pardon being with divers exceptions, he that will take advantage of it muſt plead it, and that he is not a perſon excepted; otherwiſe of a general pardon except *J. S.* for there the Court may take conuſance that he is not *J. S.* 8. *Edw.* 4. *pl.* 7.

How a pardon muſt be pleaded. 2. Jones, 26. Stra. 529. 1272. 362. 2. Hawk. 560.

THE COURT held, that it is not ſufficient in a *quo warranto* of liberties to derive an intereſt to a ſtranger in them from the queen, without making title to himſelf, for the writ is *quo warranto* he himſelf uſeth them.

In *quo warranto* the plaintiff muſt ſhew title in himſelf. 1. Term Rep. 4.

Cage *againſt* Peyton and Everet.

CASE 5.

Trinity Term, 30. *Eliz. Roll* 349.

TRESPASS *quare clauſum boſci ſui vocat' Frith fregit, et* forty loads of the wood did take and carry away. The defendant pleaded that the place WHERE was parcel of the manor of *Great Hornebey*, which manor the *Earl of Oxford* let to *Heywood* for years, "*exceptis boſcis, arboribus mahermiis, groſſis arboribus, et ſubboſcis,*" but did not covenant and agree that the leſſee and his aſſigns might take reaſonable fire-bote and hedge-bote *ſuper præmiſſa prædicta* during the term. The earl afterwards conveyed the reverſion to the plaintiff, and they as ſervants of the leſſee juſtify for reaſonable fire-bote, &c. The queſtion was, If in the place where, &c. being parcel of the wood which is excepted out of the leaſe, if by reaſon of theſe words, *ſuper præmiſſa prædict.* they might take trees, or if it ſhall be only referred to the land demiſed?

A leaſe of a manor *exceptis boſcis, arboribus, &c.* with a covenant to take fire-bote *ſuper præmiſſa prædicta*, ſhall only extend to the land demiſed. Poſt. 782. Cowp. 9.

GODFREY and EGERTON *for the plaintiff.* The fire-bote is to be taken only upon the land let, for that which is excepted is not let; and *præmiſſa* ſhall be taken for *prædimiſſa.*—SNAGG *contra.*

WRAY, C. J. The agreement that he ſhall take fire-bote, &c. *ſuper præmiſſa* ſhall only extend to the land let; but if he had averred that there was not ſufficient upon the land let, that might peradventure alter the caſe: and ſo was the opinion of the other Juſtices.—Judgment was given for the plaintiff.

Ireland *againſt* Higgins.

CASE 6.

Trinity Term, 30. *Eliz. Roll* 403.

ASSUMPSIT. The plaintiff declareth, that whereas he was poſſeſt of a *grey-hound*, which came to the defendant's hands by trover, and that he promiſed to deliver it upon requeſt, the defendant demurred upon the declaration.—LEE argued the action did not lie; for being out of the plaintiff's poſſeſſion, he had no

Trover lies for a greyhound, and it need not be averred that he was tame.—A maſtiff, a hound, a ſpaniel, and a

tumbrel, the Law will take notice of. 3. Levinz, 330. 2. Leon. 283. 2. Bro Ent. 144. 12. Hen 8. pl. 4. 5 Co. 74. b. Hob. 283. 2. Saund. 84. 1. Roll. Abr. 5. Owen, 94. 2. Cro. 44. 463. 3. Lev. 219. *cont.* Cro. Jac. 463.

IRELAND *againſt* HIGGINS.

property in it, being *feræ naturæ*, 14. *Eliz. Dyer*, 306. 12. *Hen.* 8. and by a grant of *omnia bona et catalla*, a dog paſſeth not.—TANFIELD *contra*. He agreed that if it were *feræ naturæ* there was no conſideration of the promiſe, but a dog is a thing that is tame by induſtry of man, and the law regardeth it as any other beaſt, and is of as good uſe: and there be four kind of dogs which the law regards, *viz.* a maſtiff, a hound, which comprehends a greyhound a ſpaniel and tumbler: and he had ſeen a precedent in
2. Salk. 667. 13. *Hen.* 7. *Roll* 35. where in treſpaſs of aſſault and battery, the defendant juſtified that *J. S.* was poſſeſſed of a dog *ut de bonis propriis*, and delivered it to him to keep, and that the plaintiff would have taken it from him, in which he reſiſted him; and in defence and cuſtody of his dog he beat him, and the hurt which he had was *de ſon tort demeſne*, &c. and to this the plaintiff was put to anſwer, and ſaid *de ſon tort*, &c. which proveth a property in the dog, when he juſtifieth the beating of one in defence of it. 2. *Edw.* 2. "*Avowry*". A replevin lieth of a ferret, which is of a more baſe nature, and 23. *Eliz. J. S.* brought treſpaſs for taking of a blood-hound; and found for him, and he recovered 10l. damages. And the plaintiff need not in this caſe aver the dog was tame, for the law intends it, as of a horſe. And it was adjudged for the plaintiff.

CASE 7.

Stone *againſt* Wythipol, Executor P. Wythipol.

Trinity Term, 30. *Eliz. Roll* 777, *or* 771.

Aſſumpſit cannot be maintained againſt an executor, on a promiſe to pay the debt of his teſtator, if the teſtator was under age at the time the original contract was made, unleſs he had promiſed to pay after he came of age; for there was not originally any cauſe of action. Poſt. 700.

Dyer, 272. *in mar.* 1. Ro. Ab. 24. 8. 2. Leon. 114. Yelv. 184. 4. Leon. 5. 1. Sid. 89. Strange, 94. 592. Cowp. 375. 2. Term Rep. 763.

ASSUMPSIT. And declares, that whereas the teſtator was indebted to him for certain pieces of velvet, and for 5l. of money lent, *et pro diverſis aliis mercimoniis, bonis et catallis*, and promiſed to pay him at ſuch a day, and died before the day; and the plaintiff having an intent to ſue the defendant, he required him to ſtop his ſuit till ſuch a day, and he would pay him or give him ſecurity; whereupon he ſtayed, &c. The defendant ſhewed that at the time of the delivery of the goods to the teſtator, he was within age; and thereupon it was demurred.—EGERTON *for the plaintiff*. That the conſideration here is good, and conſiſts of divers parts; the debt precedent, the teſtator's promiſe though within age, and the defendant's promiſe. And the promiſe of the infant is not void, but for his nonage he may help himſelf by plea; but if debt had been brought againſt him, and he pleads *nihil debet*, it ſhall be found againſt him: and if at his full age he had promiſed payment, it had been good, and *in foro conſcientiæ* the promiſe of the infant had been good. And 9. *Eliz.* the caſe was, *Lord Gray* was indebted to divers, and after his death *Lord Gray* his ſon, who was not his executor nor chargeable with the debts, when the creditors complained and demanded their debts of him, told them, that if his father was indebted to them, he would pay them; and upon this it was held an action lay, and the promiſe of the executor is upon good conſideration; for the plaintiff ſurceaſed his ſuit, and the executor was freed of trouble, and this matter will maintain ſuit in chancery.—COKE *contra*. That it is no conſideration, for every conſideration that doth charge the defendant in an *aſſumpſit*, muſt be to the benefit of the defendant or charge of the plaintiff, and

and no caſe can be put out of this rule. And this contract by the infant was void; and ſtaying of ſuit is no benefit to the defendant, nor any charge to the plaintiff more than was before. And this is no conſideration to ſue in chancery, for no ſuit there againſt an expreſs rule of common law, and denied the caſe of *Lord Gray*; and the defendant being not chargeable to pay the money, the ſtaying of ſuit was no benefit to him.—And afterwards THE COURT was clear of opinion the action did not lie, for the contract of the infant was merely void, and in debt againſt him he might plead *nihil debet*.—EGERTON ſaid it was adjudged in this court, in *Edmunds v. Burton*, that where an infant was bound in an obligation, and at his full age he promiſed payment, an action was maintainable againſt his executor upon this promiſe: to which the Court agreed; for the bond which was the ground of it was not void, but voidable, and he could not plead *non eſt factum*, or *nihil debet* to a bond (*a*); and if at his full age he had accepted a defeaſance of the bond, this had made it good; and in the caſe cited the promiſe was by the infant himſelf, which in conſcience he ought to pay; but the defendant is in a remote degree.—And it was adjudged againſt the plaintiff.

STONE *againſt* WYTHIPOL. Poſt. 700.

(*a*) 5. Co. 119. 2. Inſt. 483. Pop. 176. 10. Co. 43.

Wheeler *againſt* Thorogood.

CASE 8.

EJECTIONE FIRMÆ. It was held clearly by THE COURT, that if *J. S.* maketh a leaſe to *B.* to commence two years after, that after the two years are expired, *B* before any entry may grant his term, although the leſſor doth continue in poſſeſſion.

A leſſee may grant his term before entry. Ante 15.

5. Co. 124. 3. Bac. Abr. 446. Dougl. 461.

Moody *againſt* Lewen.

CASE 9.

In the Common Pleas.

Michaelmas Term, 29. & 30. *Eliz. Roll* 2529.

REPLEVIN. Upon a ſpecial verdict, it was found that *Trin.* 14. *Eliz.* a fine was levied between *Lovelace* and *Rutland*, plaintiffs, and *Fooke and ſeven others*, deforceants of the manor of *D. &c.* by which *Fooke* and the others did acknowledge the manor, &c. to the plaintiffs *come ceo, &c.* They granted it to them, &c. rendering rent with a *nomine pœnæ*, and cauſe of diſtreſs to *Fooke* in fee, who granted it to *Horden*, who conveyed it to the avowant. The plaintiff traverſed the rent to *Horden modo et formâ, &c.* and it was found that *Fooke* in his grant did recite that the fine was levied *inter Fooke* and ſeven others, plaintiffs, and *Lovelace* and *Rutland*, deforceants of the manor, and that the ſaid *Lovelace* and *Rutland* granted by it the rent, &c. to *Fooke* in fee, and he granted it to *Horden*: and, If this rent by reaſon of this miſ-recital was well granted? they prayed the diſcretion, &c.—It was argued by SHUTTLEWORTH *for the plaintiff*, and by WALMSLEY *for the defendant*; and it was adjudged a good grant, for there is ſufficient certainty of the thing granted, and of the intention of the parties to grant it; and nothing is miſtaken but the deforceants and plaintiffs in the fine, which is not material: and it was adjudged for the defendant, that he ſhould have return.

A grant of a manor is good, although in reciting a fine, it miſtakes the plaintiff for the deforceant.

Hooper

CASE 10.

Hooper *againſt* Gomerſal and his Wife.

Trinity Term, 30. *Eliz. Roll* 2403.

Where there are different *additions* to the ſame name, it muſt be averred that they mean one perſon. Poſt. 267.

DEBT againſt the defendant *Gomerſal* and his wife, executrix of *Henry Woodlade* of *London*, *taylor*. The defendants plead a recovery againſt them by *J. S.* by the names of *J. Gomerſal* and *Elizabeth* his wife, executrix of *Henry Woodlade*, of *London*, *barber-chyrurgeon*, and that *ultra* the ſum recovered they had nothing, &c. Upon this it was demurred; and adjudged no good plea, becauſe they took no averment that *Henry Woodlade taylor* and *Henry Woodlade barber-chyrurgeon* were the ſame perſon.

CASE 11.

Goſling *againſt* Warburton and Criſpe.

Michaelmas Term, 29. & 30. *Eliz. Roll* 334.

The acceptance of dower is a waiver of a right to an annuity deviſed in recompence of dower out of the ſame lands which were liable to dower.

Vide Sturges' Caſe, Dyer, 91. 2. Vernon, 365. 1. Eq. Ca. Ab. Dower, B. 9. Mod. 152. 4. Co. 4. b. Harg. Co. Lit. 366. note [1]. 1. Bro. Ch. Caſ. 292.

EJECTIONE FIRMÆ. The caſe was, *Frencham* deviſed his land to *M.* his wife till *P.* his daughter came to the age of nineteen years, and afterwards to *P.* in tail, remainder over in fee; and deviſed further, that *P.* ſhould pay after her age of nineteen years to his wife twelve pounds *per annum* in recompence of her dower; and if ſhe failed of payment, that *M.* ſhould have the land for her life. *Mary*, before *P.* came to the age of nineteen years, brought a writ of dower, and recovered a third part; and after *P.* came to her age of nineteen years, for non-payment of the twelve pounds *M.* entered; and the queſtion was, If her entry were lawful?

SHUTTLEWORTH argued that it was, and that ſhe had not waived the benefit to have the lands by the *deviſe*, by bringing her writ of dower, for then ſhe had no title to it, but her title accrued by the non-payment of her twelve pounds.—WALMSLEY *contra*.

And afterwards it was adjudged, that ſhe having recovered a third part in dower, ſhe ſhall not have the rent by the will; and it is againſt the intention of the will ſhe ſhall have both, and the acceptance of one is a waiver of the other.—And *Mich.* 31. & 32. *Eliz.* error was brought, and the judgment was affirmed; the record of which is *Eaſter* 31. *Eliz. Rot.* 247.

CASE 12.

Lowe *againſt* Lowe.

31. *Eliz.*—*In the Exchequer Chamber.*

A term held *en autre droit* does not merge by a diſcent of the inheritance to the termor.

Moor, 268. and ſee 3. Leon. 110. where this caſe is reported at large. 2. Ander. 17, 18.

EJECTIONE FIRMÆ. Upon ſpecial verdict the caſe was, *Vincent Lowe* had iſſue three ſons, and deviſed his land to his ſecond ſon for thirty years to perform his will and pay his debts, and made him his executor; and "if he died within the thirty "years, that then his third ſon ſhall have ſuch term as ſhall be "arrear of the thirty years;" and dieth. The eldeſt ſon dieth without iſſue, and the inheritance deſcends to the ſecond ſon; he dieth within the thirty years, having iſſue. The queſtion was between the uncle and the nephew, If the third ſon ſhall have the land during the reſidue of the thirty years?—It was argued by PIGOTT *for the plaintiff*, and BEAUMONT *for the defendant*, and adjudged for the uncle plaintiff; for although the term was extinct in the ſecond ſon, yet this is a new deviſe to the third ſon; for the words are, that he ſhall have *ſuch* a term, &c.

Eaſter

Eaſter Term,

31. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Charnock and his Wife *againſt* Worſley.

Trinity Term, 30. *Eliz. Roll* 833.

CASE 1.

A huſband and wife levy a fine; and the wife being within age, they brought a writ of error jointly to reverſe the fine. Adjudged that it ſhall be reverſed *in toto*, and not *quoad* the wife only.
Ante 115. 124.
Poſt. 216.

ERROR. The caſe was, *Baron* and *feme* levied a fine, the *feme* being within age; the *baron* and *feme* brought a writ of error, and ſhe was adjudged within age; and, If the judgment ſhall be, that the fine ſhall be reverſed generally or *quoad* the *feme* only? was the queſtion.—Of the plaintiffs part, two precedents were ſhewn, *Trin.* 2. *Hen.* 4. *Rot.* 49. & *Paſ.* 6. *Hen.* 8. *Rot* 26. that the fine ſhall be reverſed generally; and for the defendant a precedent was ſhewn in 7. *Eliz.* that it ſhall be reverſed *quoad* the *feme* only. But there the caſe was, That the *baron* and *feme* levied a fine, the *feme* being within age, and the *baron* died, and ſhe took a ſecond huſband; and they brought writ of error, and the fine was reverſed *quoad* the *feme* only, and her heirs.

And now it was argued by EGERTON and GOLDING *of Gray's-Inn*, that the fine ſhall be only reverſed *quoad* the *feme* and her heirs, and ſhall ſtand good againſt the *baron*; for it may be that the land was the inheritance of the *baron*, which he might lawfully convey, and that the *feme* was joined only to bar her dower; or that they were joint-tenants before marriage, ſo he might well give his part. And if it were the inheritance of the wife, yet he might diſpoſe of it during his life; and it ſhall not be reduced to him againſt his own act.

1. Roll. Abr. 748.
2. Co. 77. b 57. a.
Cro. Jac. 482.
3. Lev. 38.
Hobart, 2.
Plowd. 414.
Co. Lit. 112. 351.
1. Leon. 114.

COKE and ATKINSON *contra*. It ſhall be intended the inheritance of the wife, if the contrary be not ſhewn, as in *Pigot's Caſe*, *antea*.

F. N. B. 21.
Owen, 21.
Bro. Fin. 29.
Bro Err. 28. con.
Gilb. Uſes, 41.
Dougl. 43.

WRAY, C. J. When *baron* and *feme* join in a fine, it ſhall be intended the inheritance of the wife, and not that they are joint-tenants, or tenants in common. And if the fine ſhall be reverſed only as to the inheritance, where ſhall the freehold be, and to whom ſhall the conuſee be attendant?

GAWDY, *Juſtice*. This matter being dubious, the Court ſhall intend it to be rather the inheritance of the wife than otherwiſe; and the fine being the foundation of the conveyance, it being reverſed, all ſhall be reſtored; as the caſe in *Littleton*, ſect. 666. The

CHARNOCK and his WIFE *against* WORSLEY.

baron discontinues the land of the *feme*, and takes an estate to him and his wife; the wife is remitted, and so is the husband, though he cannot say so; for she cannot be remitted, but the husband must be also remitted, for they are one person; and this fine shall be reversed in all; for it is error in law of the court, and the *baron* by the fine giveth nothing divided from the *feme*. And all that passeth from the wife shall be reversed in all, for the conveyance is in law erroneous. As if a man confess an action which is erroneous, yet against his own act he shall avoid it by error; and if it shall be reversed *quoad* the *feme* only, then it shall be a fine levied by the husband only; and so it will be a discontinuance at the common law against the wife, which is not reason; and by the reversal of the fine, a particular interest cannot be given to the conusee. And if this fine shall stand to bind the *baron*, then the *baron* cannot join in the writ of error; for a man cannot bring an action to reverse that which binds him; but all the books are, they shall join in a writ of error.

WRAY, C. J. The *baron* giveth no more than the wife giveth with him; and this was error in Court, to receive the fine; and if the fine shall be reversed, but *cesſabit executio* during the life of the *baron*, then the wife shall not be restored to her inheritance living the *baron*, which is not reason; and here is no mischief to any; for if the conusee had made a feoffment, *scire facias* shall issue against him, in which he may shew and plead, that it was the inheritance of the *baron*, and the conusee might have pleaded it; and if he doth not, the Court will not help him.—And it was afterwards adjudged that the fine shall be reversed *in toto*. And WRAY, C. J. said, he had conferred with divers other Justices, and they were of the same opinion.

CASE 2.

Roger Windham *against* Ed. Clere.

Action upon the case lies against a justice for issuing his warrant to apprehend a man for felony, without any accusation against him.

S. C. 1. Leon. 187. Vent. 47. 2. Keb. 572. 2. Bulst. 343. 1. Com. Dig. 170. 159. Cowp. 172. Dougl. 360. 1. Term Rep. 535. 2. Hawk. 132.

ACTION upon the case. And declares, That the defendant was a justice of peace in the county of *N*. And whereas the plaintiff was a loyal subject, &c. the defendant maliciously intending to deprive him of his good name and fame, did direct his warrant, and shews it in certainty, &c. to divers constables to attach him; alledging he was accused of the stealing of the horse of *A. B.* by reason whereof he was arrested, till he put in bond to appear, &c. *ubi revera* he was never accused, nor did steal the horse, and the defendant did know him to be guiltless; by reason whereof he was greatly discredited. Upon *non culp'* pleaded, it was found for the plaintiff.—And it was held by CLENCH and GAWDY, the action was maintainable. If a man be accused to a justice of peace for an offence, for which he causes him to be arrested by his warrant, although the accusation be false, yet he is excusable: but if the party be never accused, but the justice of his malice and own head cause him to be arrested, it is otherwise. And they commanded judgment to be given for the plaintiff, 14. *Hen.* 8. (*a*).

(*a*) In the case of *Morgan v. Hughes*, 2. Term Reports, 225. this case is denied to be law. The action should have been *trespass* and not *case*; for the injury is *immediate*, and not *consequential*. This is a settled distinction. 11. Mod. 189. Ld. Raym. 1402. 3. Bl. Com. 123. Strange, 635.

Havithbury

Havithbury *against* Harvey and his Wife. Case 3.

DEBT upon the 5. *Eliz.* c. 2. ſ. 12. And demands ten pounds, for that he ſerved a proceſs upon the *feme* as a witneſs, and tendered to her ſufficient charges, &c. and ſhe appeared not, &c. and upon iſſue joined, it was found for the plaintiff.—And it was alledged in arreſt of judgment, that he doth declare, that the non-appearance was to his damages, and ſheweth not what damages. Alſo that a *feme covert* is not within the ſtatute, and the charges ought to be tendered to the *baron*; for the charge lieth upon him. —Lewis. The action is not brought for the damages which he had by her non-appearance, but for the ten pounds given by the ſtatute.—Secondly, a *feme covert* is within the ſtatute; for ſhe may be the ſole witneſs.—Thirdly, ſhe is the perſon puniſhable for not coming, and the tender therefore is to be to her: and the plaintiff had judgment.

A feme covert is within the 5. Eliz c. 9. Cro. Car. 522. 540. Wm. Jones, 430. March 18. 5. Mod. 355. Comb. 449. 1. Salk. 206. Douglas, 560. 2. Bac. Abr. 294.

Hoe *against* Marſhal. Case 4.

Hilary Term, 30. Eliz. Roll 788.

DEBT upon an obligation. The condition was, That if *Oſbert Fuller* ſhall not appear at the next court in *Thetford* to anſwer to the plaintiff, &c. if then the ſaid *Oſbert* before the firſt day of *October* found ſurety to anſwer, that then, &c. The defendant pleads, that the ſaid *Oſbert* did appear at the next court. The plaintiff replieth, that he did not appear, *et de hoc ponit ſe ſuper patriam*; and upon this iſſue was joined, and found for the plaintiff.—And it was alledged in arreſt of judgment, that this was miſ-tried; for it ſhall be tried by the record, and not *per patriam*, for every appearance is upon record—.But the Court held the trial good; for it appeareth not that he appeared, and that his appearance was upon record; but his plea is, that he appeared at ſuch a day in the court, which may be, and his appearance not entered; and yet by it his bond is ſaved, and he himſelf doth not conclude, *prout apparet de recordo*. And Wray ſaid, that appearance at ſuch a day may be tried *per pais*: but appearances generally ſhall be tried by the record. And Gawdy ſaid, if it be miſ-tried, it is aided by the ſtatute 32. *Hen.* 8.—And it being the next term moved again, and a rule given, if the cauſe be not ſhewn the next day, that judgment be for the plaintiff.

An iſſue whether the obligor of a bond appeared in court upon the day mentioned in the condition ſhall be tried *per pais*, and not by the record. Poſt. 579. Co. Lit. 6. 5. Bac. Abr. 214. 3. Bl. Com. 336.

Piers *against* Hoe. Case 5.

TRESPASS. The caſe upon ſpecial verdict was; That a woman who was tenant for life as a jointureſs, takes a ſecond huſband, and they by deed convey the land to *Clerke* and his heirs, *habendum* to him and his heirs, to the uſe of him and his heirs for the life of his wife only; and the queſtion was, If this were a forfeiture? And it was argued by Popham *for the plaintiff*, and Coke *for the defendant*.—Gawdy held it no forfeiture, and that the words "*for the life of the wife*" ſhall refer to both. For in conſtruction of a deed, where the words are doubtful, reaſonable conſtruction

Tenant for life jointureſs takes a ſecond huſband. They convey to the uſe of *A.* and his heirs, for the life of the wife only. This is a forfeiture within 11. Hen. 7. c. 20. Poſt. 407.

1. Roll. Abr. 854. 1. Leon. 125. 8. Co. 44. 2. Bac. Abr. 497. 1. Wood's Con. 82.

Pierr *against* Hoe.

shall be made; and when words are in a deed to express the parties intent, they shall not be taken as void; and here the words "*for* "*the life of the wife*" are put in to exclude the forfeiture, and to save the estate. And of this opinion were Wray and Schute upon the first motion, but Clench *contra*.—But at another day it being moved again, Gawdy held his former opinion; but Wray and the other Justices held it a forfeiture. For Wray said, by the deed at first a fee simple did pass, and that to the use of the feoffee, then the estate and the use are several things, and cannot be coupled to the words "*for the life of the wife*." And Wray said, he had demanded the opinion of the Justices of his house, and they held it clearly a forfeiture in the words, and that the words "*for life, &c.*" shall refer only to the use: and it was so adjudged.

Case 6.

Ordeway *against* Parret and Halsey.

If the principal pay the sum recovered, the bail shall be excused; but it cannot be pleaded to a *scire facias* unless satisfaction is entered on the record.
Post. 233.
2. Lev. 212.
1. Roll. Abr. 335.

SCIRE FACIAS brought against the defendants, who were bail upon a bill of debt brought against *Bennet*; who pleads, that the principal had paid the money in which he was condemned to the plaintiff, according to the condition of the recognisance.—Per Curiam it was ruled no plea without pleading payment of record. For it was said, that the condition is, that the defendant shall satisfy the debt, otherwise the sureties would do it. And this is to be understood of the most sufficient satisfaction which is of record; and therefore they disallowed the plea, and would not suffer it to be entered, or to be demurred upon; and did command Gerard, who pleaded the plea, to plead another plea; otherwise a *nihil dicit* shall be entered.

1. Mod. 24. 1. Vent. 49. 1. Bac. Abr. 218. 2. Term Rep. 576.

Case 7.

Watkins *against* Ashwicke.

Where tender by a stranger is void.
1. Leon. 34.
Ow. 137.
Moor, 222.

NOTA by Coke, that it was adjudged, *Trin.* 27. *Eliz.* between the said parties, that where one tendered money upon a mortgage for an infant, who was not guardian, nor was to have any interest in the land, that it was adjudged a void tender.

Co. Lit. 206. b. 9. Co. 106. a. 5. Bac. Abr. 4. 3. Wilf. 527.

Case 8.

De Bavoy *against* Hassal.

In *assumpsit* for work and labour, on a promise to pay on request as much as would *content* him, neither the time or place of the request need be shewn.
Ante 74.
Ld. Raym. 132.
2. Term Rep. 29.

ASSUMPSIT. The plaintiff declared, that in consideration the defendant had retained him to go from *London* to *Paris* in *France* upon his occasions, he assumed to give him so much as would content him; and alledged that he went thither, and was content to take five-and-twenty pounds for his labour; and at such a place he requested the defendant to pay it, which he refused.

Coke moved in arrest of judgment, that he shewed no time or place when he gave notice of his contentment, and therefore was not good; for it hath been adjudged, that where one doth promise to give another twenty pounds upon request, and because no place was alledged of the request, the judgment after verdict was stayed.

Gawdy, *Justice*. The ground of this action is the *assumpsit*, but this cannot be certain without the party's declaration. So the notice

notice is to make the certainty of the duty, but not to inforce or impeach the promiſe; and in the caſe alledged, the *aſſumpſit* is nothing without requeſt. But here being only a conveyance, the certainty of the time and place is not neceſſary: but this general form will ſerve, for it is but inducement; for the contentation is not the cauſe of the action; as the caſe in 39. *Hen.* 6. in debt againſt a ſucceſſor of a parſon for an annuity granted by his predeceſſor, *pro conſilio impenſo et impendendo*; and declares, that he gave counſel as he ought (otherwiſe the action lay not), but ſhewed no place where, yet good.

DE BAVOY *againſt* HASSAL.

WRAY, C. J. accords; for the place where he was content is not material, nor iſſuable; for none can try it but himſelf. Alſo it is remedied after verdict: and it was adjudged for the plaintiff.

Finymore *againſt* Sanky.

CASE 9.

Michaelmas Term, 30. & 31. *Eliz. Roll* 174.

DEBT for ſeven pounds thirteen ſhillings and fourpence. Upon *nihil debet*, the jury found that the defendant did owe ſix pounds thirteen ſhillings and fourpence, but ſpoke not of the other twenty ſhillings.—And this was aſſigned for error, that the verdict was ill, and not remedied by the ſtatute of 32. *Hen.* 8. c. 30. And for this cauſe it was reverſed.

If a verdict find only part of what is in iſſue, it is bad for the whole. Poſt. 292. Salk. 133.

17. Mod. 5 1. Vent. 27. Cro. Jac. 328. Co. Lit. 227. 3. Leon. 82. Hard. 166. 239. 1089. 844. 887. 2. Ld. Raym. 1520. Cowp. 706. Dougl. 666. 1. Term Rep. 239. Sayer, 36. Stra. 447.

Arundel *againſt* Short and his Wife.

CASE 10.

Michaelmas Term, 30. & 31. *Eliz. Roll* 434.

ERROR, upon a judgment given in treſpaſs by *baron* and *feme*, of their cloſe broken and corn carried away.—Error aſſigned, that *feme* ought not to join, for ſhe can have no property in the corn. 48. *Edw.* 3. *pl.* 18. 9. *Edw.* 4. *pl.* 52. In perſonal actions they cannot join.

Huſband and wife cannot join in treſpaſs for carrying away corn. Sed vide ante 96.

GODFREY and COKE *contra*. It is in the election of the *baron* to join his wife in perſonal actions; and it may be intended that they were joint-tenants of the corn before coverture, or that the *feme* had it as executrix; and if the writ by any intendment may be good, it ſhall not abate.

GAWDY. The books agree, that for perſonal things they cannot join; but for perſonal things in action, it is in the election of the huſband to join his wife, or not.—And *Trin.* 31. the judgment was reverſed. *Vide* 21. *Hen.* 6. 30. 14. *Eliz. Dyer*, 305. 7. *Hen.* 7. 2.

Vide ante 96.

Muſket *againſt* Cole.

CASE 11.

ASSUMPSIT. And declareth, that in conſideration the plaintiff had paid to the defendant forty pounds for the debt of *J. Muſket* his ſon, the defendant aſſumed to deliver to him all the bills and obligations in which the ſaid *J. Muſket* was bound to him; and alledgeth *in facto* a requeſt and denial to deliver, &c. and upon *non aſſumpſit*, it was found for the plaintiff.—And it was moved in arreſt of judgment, that the plaintiff had not averred

In an action to recover damages for the detention of *bonds and bills*, THEY need not be ſpecially ſhewn.

MUSKET *against* COLE.

that the defendant had any bills or obligations of the said *J. Musket* in his hands; and if he had none, the plaintiff was not damnified. 37. *Hen.* 6. *pl.* 29. 19. *Eliz. Dyer*, 356. & 297.

GODFREY *for the plaintiff* said, that when it is alledged, that he required the defendant to deliver them; in this it is implied, that he had some bills, &c. and the plaintiff need not shew them specially.

GAWDY, *Justice*. The plaintiff is not to recover the bills, &c. but only damages, and so need not alledge what the deeds were; as the cases in 47. *Edw.* 3. *pl.* 3. and 46. *Edw.* 3. *pl.* 4. the difference taken where he is to recover damages, and where the land. And here it may be given in evidence what bills, &c. he had: and the plaintiff had judgment.

CASE 12.

Knight *against* Jermin.

See the Commencement of this Case, ante 70.

An action on the case will lie against one person for a malicious prosecution. Ante 70.

IT was now moved again by COKE. And he said, this malicious intention and endeavour before the bill exhibited, is to be punished, although the indictment was lawful to be preferred by any one for the queen. The words here, and in a conspiracy, are all one; and as a writ of conspiracy lieth against two, so here against one; and it is here alledged to be done maliciously. And here he caused the indictment to be written before he came into the court, which is not the office of a witness; and where malice is, his oath doth not excuse him; but if he had done it by the command of THE COURT, it had been otherwise. 21. *Edw.* 3. 17. 7. *Ass.* 12. 20. *Hen.* 6. 5.

F. N. B. 114. Cro. Jac. 131. 357. 1. Roll. Abr. 111. 2 Roll. Abr. 77. Cro. Car. 15. 9. Co. 56. 1. Hawk. 347. 349. Ld. Ray. 378. 1169. Stra. 193. 3. Bl. Com. 136.

GAWDY, *Justice*. If the defendant did it upon good presumptions, he ought to plead them; as that he found him in the house, &c. or the like cause of suspicion; but no such thing is pleaded, otherwise every one shall be in danger of his life, by such malicious practices.

WRAY, *Chief Justice*, agreed.

Wood's Inst. 414. 1. Term Rep. 493. 535. 548. 2. Term Rep. 225.

Trinity

Trinity Term,

31. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.* }
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Brooke *againſt* Doughty.

CASE 1.

Hilary Term, 31. *Eliz. Roll* 798.

ACTION for words, for calling him "a perjured perſon, "and that he was forſworn in the court of requeſts, and "that he ſhall ſtand upon the ſtage." The defendant pleads not guilty; and it was found, that he ſpoke none of the words but "that he was forſworn in the *court of requeſts*." And the queſtion was, If theſe words were actionable?—COKE moved, that for ſaying a man is forſworn, no action lieth. And in *Trin.* 28. *Eliz.* between *Herne and Haxe*, for ſaying "he was forſworn in the *court* "*of Whitchurch*," no action lieth. And in this term in the common pleas, between *Samms and Cowbolt*, which is entered, *Trin.* 28. *Eliz. Rot.* 636. for ſaying, "he had proved him forſworn in the "queen's bench," no action lay.—But THE JUSTICES (WRAY being abſent) held the action lay. And for the caſe of *Whitchurch*, GAWDY ſaid, the reaſon was, becauſe it is a baſe court; of which this Court ſhall not take cognizance. But the court of requeſts is a court of which this Court ſhall take cognizance.—And in *Mich.* 31. & 32. *Eliz.* the caſe was moved again; and by conſent of WRAY, judgment was given for the plaintiff, but the damages were abridged.—NOTA. DANIEL ſhewed a precedent, which was *Trin.* 23. *Eliz. Rot.* 882. between *Foſter* and *Thorne* (*a*), that for theſe words, "Thou wert falſly forſworn in the ſtar-chamber," an action did lie.

To ſay of another that "he was forſworn in the *court of requeſts*," imports perjury. Poſt. 297. 394. 492. 573. 609. 788. 905. Cro. Jac. 190. 1. Com. Dig. 178.

(*a*) 1. Leon. 127.

Toft *againſt* Tomkins.

CASE 2.

Trinity Term, 30. *Eliz. Roll* 528.

THE caſe upon ſpecial verdict was, There was grand-father, father and ſon; the grand-father tenant for life, the remainder to the father in tail. The grand-father maketh a feoffment to the uſe of himſelf for life, remainder to the father in fee; then the grand-father and father infeoff the defendant. The queſtion was, If this were a diſcontinuance? COKE *for the plaintiff*, and GODFREY *for the defendant*.—GAWDY and SCHUTE held it clearly a diſcontinuance; for when the father in remainder enters to make a feoffment, he is remitted by reaſon of the forfeiture committed before; and by this had gained the poſſeſſion, and it is only his feoffment, and ſo a diſcontinuance; for both cannot have poſſeſſion. CLENCH *contra*. For the intent of his entry was to join with the other; and his intent appears, that his and the grand-father's eſtate ſhall paſs together; and this explaineth it, that he will not enter for forfeiture, and ſo is no diſcontinuance. *Et adjournat' abſente* WRAY.

A diſcontinuance cannot be committed by a tenant in tail, who has never been ſeiſed by force of the entail. Poſt. 827. Co. Lit. 339. 347. 1. And. 44. 1. Leon. 127. 1. Roll. Rep. 188. 3. Com. Dig. 77. Cowper, 702. 1. T. Rep. 738.

CASE 3.

Boyton *againſt* Andrews and Simpſon.

Hilary Term, 30. *Eliz. Roll* 156.

What requeſt is ſufficient for the performance of a covenant.

1. Wood's Con. 394. 440.

DEBT upon an obligation. The condition was to make an aſſurance to the obligee of certain land before the 10th *March*, 17. *Eliz.* and if it fortune that the obligee refuſe to accept the aſſurance, and ſhall make requeſt to have 100l. in ſatisfaction of it; then if upon ſuch requeſt within *five months* after he pay the 100l. that then, &c. At the day he refuſed the aſſurance, and afterward, 27. *Eliz.* he maketh requeſt to have the 100l. If this requeſt were ſufficient for the time? was the queſtion upon demurrer.—Upon motion without argument, the opinion of THE JUSTICES was, that a requeſt at any time, during his life, was good; and he is not reſtrained to make it at or before the day the aſſurance was to be made. And judgment was for the plaintiff.

CASE 4.

Coteford *againſt* Peaſe.

It is a good *modus* for one pariſh to pay tithe for paſture to the vicar of another pariſh, &c.

1. Eq. Caſ. Ab. 367. Fitz. 119. 2. Peer Will. 572. Dougl. 204, 205. 1. Term Rep. 427.

PROHIBITION. The plaintiff ſueth the defendant for tithes in ſpecie of certain paſtures in *N.* where he was parſon. The defendant to have a prohibition ſurmiſeth, that he was an inhabitant in *S.* and that time out of mind every inhabitant there that had paſtures in *N.* had paid tithes for them to the vicar of *S.* and that the vicar of *S.* had paid to the parſon of *N.* two-pence for every acre.—THE COURT held the prohibition did lie, and that the plaintiff ſhall declare, and the defendant may demur to it if he will; for it is as if he had preſcribed to pay two-pence for every acre.

CASE 5.

Botham & Cooper *againſt* Lady Greſham.

Prohibition. Ante 71. Poſt. 306.

PROHIBITION. That ſhe ſued them in court chriſtian for tithe hay; and ſurmiſed, that time out of mind they had paid to the vicar there four-pence for the tithe hay of every acre.—COKE moved, this was not good, for here *modus decimandi* ſhall not come in queſtion; but he ought to plead it in the ſpiritual court, that it appertains to the vicar, and not to the parſon; and if the vicar ſue for tithes, there *modus decimandi* ſhall come in queſtion.—And a conſultation was granted. *V. Caſum præcedent.*

CASE 6.

Gomerſal *againſt* Biſhop.

Hillary Term, 31. *Eliz. Roll* 751.

A variance between the *ſuggeſtion* and the *declaration*, in prohibition, is fatal to the whole proceedings. Cowper, 178. 1. Term Rep. 427. 656.

PROHIBITION. The plaintiff ſurmiſed, that he ſued him for tithe of hay, whereas there was an *agreement* between them, that for the ſum of ſeven ſhillings *per annum* he promiſed him, that he ſhould have the tithes of this land for his life: and in his declaration he ſaid, that for this ſum the defendant *let* him his tithes for life.—And for this variance THE COURT held all to be ill, for the ſurmiſe is as the writ; and if there be variance between the ſurmiſe and declaration, all is ill.

A diſcharge from tithes may be by parol. Poſt. 188.

Cro. Jac. 137.

GODFREY ſaid, it had been ruled in *Pendleton v. Hunt* (*a*), that an agreement between the parſon and the pariſhioners was a good cauſe to grant a prohibition, for the ſpiritual court cannot try it: and they will not allow the plea.

3. Burr. 1873.

(*a*) 1. Leon. 128.

Stedman's

Stedman's Caſe.

CASE 7.

An indictment for perjury muſt ſhew in what cauſe the party was ſworn. Poſt. 148. Dougl. 156. 1. T. Rep. 69.

STEDMAN was indicted upon the 5. *Eliz.* c. 9. for perjury; and the judgment was, That he was examined upon certain articles in the ſtar-chamber, and that *falsè et voluntariè depoſuit*; and ſhews not in what matter he ſwore falſly, nor in what action; and the oath was in the ſtar-chamber in *Middleſex*, and the indictment in *Stafford*. And he was diſcharged.

Richard Thomas's Caſe.

CASE 8.

The ſtatute of perjury muſt be ſtrictly purſued. Ante 105. Poſt. 147. 2. Leon. 211. 214.

HE was indicted upon the 5. *Eliz.* c. 9. for perjury; and recited the ſtatute, That if any be ſworn, &c. *in any court* of record, whereas the ſtatute doth mention *them* ſpecially, &c. Alſo that *apud caſtrum Lincoln. falsè depoſuit*, and ſhews not in what county the caſtle was, &c. And it wanted the concluſion, *et ſic falsè et voluntariè perjurium commiſit, &c.* And he was diſcharged.

Sho. 190. Sav. 43. Holt, 534. Skin. 403. 1. Hawk. 328. 2. Hawk. 321.

Lenthal's Caſe.

CASE 9.

An indictment muſt ſhew in what county it was taken, and where the offence aroſe. Poſt. 606. 738. 751. 1. T. Rep. 69.

LENTHAL was indicted for the murder of *Coke*; and the words were, *Inquiſitio capta apud Hereford, &c.* but ſhewed not in what county *Hereford* was, which ſhould be of neceſſity; for the coroner or juſtice of the peace cannot take an inquiſition out of their juriſdiction. Alſo it ſhewed not the place where the ſtroke was given.—And for theſe cauſes the indictment was held to be void.

2. Hawk. 259. 265. 314. 362. 3. Bac. Abr. 101.

Goſlen's Caſe.

CASE 10.

Indictment quaſhed for bad Latin. Co. 5. 121. a. Poſt. 231.

GOSLEN was indicted for the murder of *Marſum*; and the indictment was, That *percuſſit in brachia ſua dextra.*—COKE moved, that this was *falſe Latin*, and without ſenſe, or certainty where the ſtroke was, and ſhewed not where the party died of the ſtroke; for it was, "and ſo of it *eo inſtante die obiit.*"—And the opinion of THE COURT was, that it was vicious.

Kirkby *againſt* Coles.

CASE 11.

Hilary Term, 31. Eliz.

Where mutual promiſes are made at the ſame time, an *aſſumpſit* will lie. Poſt. 703. Hob. 88. 2. Jones, 168. 1. Leon. 186. Cowp. 290.

ASSUMPSIT. And declared, that whereas a certain communication was between him and *Cooper*, for the maſting of certain hogs for the plaintiff; in conſideration that the plaintiff gave to *Cooper* three ſhillings for every hog well maſted, the defendant aſſumed that they ſhould be well fatted, and re-delivered to him; to which promiſe he giving credit, did deliver to *Cooper* one hundred and fifty hogs to be maſted; and for that fifty of the hogs which were not re-delivered to the plaintiff, he brought his action.—After verdict, TREDWAY did alledge in arreſt of judgment, that there was no conſideration to charge the defendant, for he had no benefit. But GODFREY alledged for the plaintiff, that the promiſe was the cauſe of the contract, and being made at the time of the communication it ſhall charge him; otherwiſe perhaps, if it were made at another time. And it was adjudged in *Smith v. Edmunds*, where two merchants were indebted one to the other, and

Ante 42.

Kirby *against* Cotes.

and they agreed to deliver all their bills and bonds into the hands of the defendant, he did assume, that he would not deliver them till all actions were determined between them; and notwithstanding he had delivered to one of them, and the other party brought his action, and it was adjudged maintainable, yet he had no benefit by keeping of them: yet that was not material; for the action was grounded upon the promise and deceit: so here.—And of that opinion were Wray and Clench, because the promise was at the time of the communication. Gawdy, *Justice*, was of the contrary opinion.

Case 12.

Warcop *against* Morse.

Assumpsit will lie on a promise to assure land, though made after the sale. Ante 94.

Leon. 297. 2. Com. Dig. 582. 2. Bac. Ab. 170.

ASSUMPSIT. And declares, that in consideration he had bought of the defendant three parcels of land upon the 10th *December*, he afterwards, *viz.* 19. *December*, assumed to make him a sufficient assurance thereof before such a day. After verdict, Godfrey moved, that the consideration was executed.—But it was adjudged for the plaintiff; for the assurance was the substance of the sale and matter.

Case 13.

Stretton *against* Tayler.

The Attorney General cannot enter a *nolle prosequi* to an action *qui tam*, except for the King's part of the penalty. Post. 383.

2. Roll. Rep. 136. 11. Co. 65. b. 3. Inst. 194. 2. Bl. Com. 437. 2. Hawk. P. C. c. 85. s. 21. 2. Hawk. c. 26. s. 64. Comp. 611. Dougl. 239.

INFORMATION upon the statute of usury, *tam pro seipso quàm pro reginâ*. The queen's Attorney entered a *non vult prosequi*, and this was now pleaded in bar against the informer for all; and it being moved in court, Wray held it should be no bar. But Popham, *Attorney*, alledged, that it cannot be found in any record, that the party had proceeded, when the Attorney had entered a *non vult prosequi*. For they do it not without great consideration, when the information had long depended, and nothing done in it; and it is entered for the ease of the subject, that he should not be grieved without cause; and it is not against reason, that in personal suits the act of the one plaintiff should prejudice the other. And here the queen is the principal and first named; and if it were *pro dominâ reginâ tantùm*, it is clear she might discharge it; and the replication shall be in the Attorney's name only; and therefore, after plea pleaded, the queen is only party in a manner. And it was adjudged within these eight years, that if the informer be non-suited, the queen cannot proceed; and by the same reason, where the queen will not proceed, it bars the party; and the records of all times warrant it.—But at another day it being moved again Wray said, they all held that the entry was no bar to the party; and that upon conference, Anderson and Manwood were of the same opinion, that the party is not barred by the queen's not proceeding; for in that the law giveth the party the moiety, the queen cannot discharge it. And Wray and Gawdy denied that the non-suit of the party did bar the queen.—And it was afterwards ruled that the party is not barred by this entry. 11. *Co.* 65. *b.*

Case 14.

Perry *against* Soam.

Michaelmas Term, 30. & 31. *Eliz.* *Roll* 482.

A prescription *in non decimando* for green tares cut before they are ripe, and given to *milch kine*, and *draft cattle*, is good; but a *modus* to pay so much for every *calf*, *lamb*, *fleece*, in lieu of tithe for all *dry cattle*, *sheep*, and *wool*, &c. is bad. 2. Leon. 27. Bunb. 279. 2. Ld. Ray. 1159. 3. Com. Dig. 88. 90.

PROHIBITION against the defendant, parson of the church of *Sherring* in *Essex*, for that he had libelled in the spiritual

court for tithes of green tares eaten before they be ripe; for tithes of herbage of dry cattle; for tithes of ſheep bought or ſold; and for churchings and burials. He ſurmiſed, as to the green tares, that in the ſaid pariſh they had not ſufficient meadow or paſture for their draft cattle and milch kine; and in conſideration thereof they had uſed time out of mind, &c. to pay the tenth ſhock of their ripe tares; but for the green tares which were eaten before they were ripe, in conſideration they gave them to their cattle, they were diſcharged of tithes for the ſame.—As to the herbage for dry cattle, he ſurmiſed, that every pariſhioner there who had milch-kine and calves under the number of ſeven, ſhall pay for every calf he rears one half-penny; for every one they kill one penny; for every one they ſell the tenth penny; and if he have ſeven or above, to give one in ſatisfaction of tithes of them and all dry cattle.—As to the tithes of ſheep bought or ſold, he ſurmiſed, that they paid for the lamb one half-penny, and for the wool and fleece of the ſheep one penny; and for all ſheep bought or ſold between the *Lady-day* and *Lammas*, to pay four-pence: and to the reſidue of the year ſaith nothing, nor to the churchings and buryings: and for that it was clearly held ill.—And to the firſt, COKE ſaid it is no good ſurmiſe; for he may as well preſcribe to be diſcharged of hay given to his cattle, and it is a preſcription *in non decimando*; and he doth not preſcribe for all tares, but for thoſe given to his cattle; and hath not averred they were given to his cattle; ſo purſueth not his preſcription, as 10. *Edw.* 4. *pl.* 2. is that he ought. To the ſecond ſurmiſe, it is not good; for he alledgeth not that he had calves; for if he hath no calves but dry cattle he pays nothing, and it is uncertain whether he ſhall have calves or not; ſo it is an uncertain thing for a certain duty. And laſt term it was ruled in the *Lady Greſham's Caſe*, where one preſcribed to pay yearly by the hands of two perſons inhabiting in ſuch houſes, four-pence to the vicar in ſatisfaction of all tithes, it was adjudged ill; for the houſes may decay, or none live in them; ſo nothing ſhall be paid.—As to the firſt, the Court held it a good ſurmiſe; for WRAY, *Chief Juſtice*, ſaid, the matter is the want of meadow and paſture; and if he had ſaid, for want of meadow and paſture they had uſe to eat their meadows with their cattle, and for ſo much as they did eat to pay no tithes, it had been good. But for the ſecond, the not averring he had calves, this cannot be good; and the others are not to be defended. Therefore for all, except the firſt, conſultation was granted; and for that they would adviſe.

PERRY *againſt* SOAM.

Cro. Jac. 47.

Engliſh *againſt* Pellitory Tayler & Smith.

CASE 15.

Michaelmas Term, 30. & 31. *Eliz. Roll* 521.

TRESPASS for aſſault, battery, and wounding. Two of them pleaded, that they were leſſees of certain lands; and there were certain poſts upon the land, and the plaintiff would have taken them away, and they gently took them from him, &c. The third pleaded, that he came and found them contending for the poſts, and he parted them, *molliter* laying his hand upon the plaintiff. The plaintiff replieth, *de injuriis ſuis propriis abſque tali cauſâ*; and found for him.—HARRIS moved, that this was no iſſue; for the plain-

The replication, "*de injuriis ſuis propriis abſque tali cauſâ*," to two ſeveral juſtifications, by different defendants, in the ſame action, held good.

1. Leon. 124. 1. Salk. 218, 219.

English *against* Pellitory Tayler & Smith.

plaintiff ought to have made ſeveral replications, and *abſque tali cauſâ* can be no iſſue to all.—The Court ſaid, though it be no good form of pleading, yet by reaſonable conſtruction theſe words *abſque tali cauſa* being *nomen æquivocum*, ſhall be referred to every cauſe; and ſo the pleading ſhall be maintained: and judgment was given for the plaintiff (*a*).

(*a*) See 4. & 5. Ann. c. 16.

Case 1.

Sir Thomas Cecil *againſt* Harris.

In the Common Pleas.

Trinity Term, 29. Eliz. Roll 823.

If "*levy per diſtreſs et ſic non detinet*" be pleaded to debt for rent, and it be found the rent was paid, but not by *diſtreſs*, the verdict is for the defendant. Poſt. 157. 209. 634.

Cowp. 766. Dougl. 666. 1. Term Rep. 236. 659.

DEBT againſt the defendant as executor for the arrearages of rent in time of the teſtator. He pleaded *levy per diſtreſs & ſic non detinet*. Upon iſſue joined, it was found by verdict, that a ſtranger who was the aſſignee of the term, by the executor, had paid the rent to the plaintiff, who had accepted it; but no diſtreſs was taken for it: and, If the plaintiff ſhould have judgment upon this plea? was the queſtion.—Anderson, Periam, and Wyndham, held clearly, that judgment ſhall be againſt the plaintiff; for the ſubſtance of the plea is found with the defendant; for it is found the rent is paid; ſo *non detinet* the rent; and the ſubſtance is upon the *non detinet*, and not upon the *levying by diſtreſs*.—Walmsley held ſtrongly the contrary, that the ſubſtance of the plea is upon the levying by diſtreſs; and if it be found it was not levied, the reſidue is not material; for this is the matter traverſable; and upon this is the iſſue, and ſo is 4. *Hen.* 6. and 33. *Hen.* 6. But the other Juſtices clearly againſt him; and Anderson denied the book of 4. *Hen.* 6. and ſaid other books are againſt it.

Case 2.

Sutton's Caſe.

In ejectment by a *leſſee* againſt a *leſſor*, if the jury find ſpecially that the leſſor had no intereſt in the land demiſed, yet the plaintiff ſhall have judgment; for a jury may find an *eſtoppel* on the *general iſſue*. Ante 37. Poſt. 309.

Co. Lit. 227. a. Owen, 96. Cro. Car. 110. 2. Co. 4. b. 4. Co. 53. a. 1. Leon. 206. 2. R. Ab. 690. 1. Saund 327. 1. Salk. 276. 3. Bac. Ab. 441.

EJECTIONE FIRMÆ. And declares of a leaſe for years made to him the plaintiff by the defendant himſelf. Upon not guilty pleaded, the jury found a ſpecial verdict, that the defendant had nothing in the land when he made the leaſe to the plaintiff; and that afterwards he entered upon the plaintiff; and the jury finding the whole matter at large, the queſtion was, If his entry was lawful?—Anderson and Periam held clearly, that the plaintiff ſhall recover; for this is a good leaſe, and intereſt between the parties, ſo that the leſſee may enter, and the other cannot put him out; and when he hath right and intereſt, he may have his action; and this may as well be found by the jury, though but a matter of eſtoppel, as any other matter. And Anderson ſaid, it hath been adjudged, if *A.* levy a fine to *B.* of his own land for years, and *B.* is ouſted, *A.* ſhall have an aſſiſe; and they ſaid, the jury in any caſe are bound to find an eſtoppel: and in *Pleadal's Caſe*, becauſe they would not find an eſtoppel, they were attainted.—Walmsley held the contrary; for being a matter of eſtoppel, and the jury being ſworn to find *veritatem facti*, they ſhall not find an eſtoppel; and the jury having found the matter at large, and the truth appearing to us that the plaintiff had not right nor cauſe of action but by eſtoppel, we muſt

5. Bac. Ab. 315. Cowp. 601. 579. 3. Term Rep. 86, 704. 2. Term Rep. 171.

judge

judge according to the truth of the matter. WYNDHAM seemed to agree with him, that it ſhall be adjudged according to the truth of the matter: and thereupon PERIAM ſaid, they would know the opinion of other Juſtices; but ſaid privily there was no great queſtion in it. SUTTON'S CASE.

Marler *againſt* Wright and Green. CASE 3.

Int. 30. & 31. *Eliz. Roll.* 803.

EJECTIONE FIRMÆ. The caſe was, *Edmund* biſhop of *London* made a leaſe 6. *Eliz.* for twenty-one years of land part of his biſhoprick, rendering the ancient rent, and afterwards was tranſlated to *York*; and 17. *Eliz. Edwin* then biſhop of *London* granted the land to three for their lives, rendering the ancient rent: the leſſee attorneth, the dean and chaper confirm the leaſe. *Edwin* was tranſlated to *York*, and *John* now biſhop of *London* made a leaſe to the plaintiff. The queſtion was, If the leaſe for three lives, being confirmed by the dean and chapter, was void to bind the ſucceſſor by the ſtatute of 1. *Eliz.* c. 19. the leaſe for years being then *in eſſe?*—And it was adjudged, that the leaſe for three lives did not bind the ſucceſſor. And the principal reaſon was, that by the words of the ſtatute, upon leaſes made by biſhops, the ancient rent muſt be reſerved, and yearly payable; and in this caſe, the rent reſerved upon the grant for three lives in reverſion, although it be due, yet the ſucceſſor had no remedy for it, during the leaſe for years, by diſtreſs or by action of debt, being reſerved upon a leaſe for life; nor by aſſiſe, for he had no ſeiſin; and ſo it is not due or payable, according to the intent of the ſtatute. And the plaintiff had judgment.

A biſhop's leaſe for three lives concurrent with a leaſe for 21 years by his predeceſſor, is void. Co. Lit. 45. a. 1. And. 193. Moor, 253. 3. Lev. 439. 10. Co. 62. 3. Com. Dig. 251. 3. Bac. Abr. 347.

Smalwood and two others *againſt* the Biſhop of Coventry, &c. and Marſh. CASE 4.

QUARE IMPEDIT brought by the plaintiffs, as executors of *William Sale*, for not ſuffering them to preſent to the archdeaconry of *Derby*, which became void in the time of the teſtator, and belonged to him, and after his death to the plaintiffs, to preſent; and the writ and count ſuppoſed a diſturbance to the teſtator in his life, *in nunc retardationem executionis teſtamenti prædict'*. And it was demurred upon it.—Firſt, becauſe the arch-deaconry is yet void; and ſo they may have an action for the diſturbance to themſelves. Secondly, there is no ſuch writ in the Regiſter. Thirdly, here is a double diſturbance, to the teſtator and to themſelves. Fourthly, the diſturbance to the teſtator is alledged to be *in retardationem executionis teſtamenti*, which cannot be; for in the time of the teſtator there was no teſtament. 25. *Edw.* 3. *pl.* 40. 4. This is not an action given by the equity of the ſtatute of 4. *Edw.* 3. c. 7. 5. Fifthly, an arch-deaconry is ſuch a ſpiritual promotion for which an action lieth not; for it is a ſpiritual office and function, and hath no certain place to be inducted in; as 24. *Edw.* 3. *pl.* 42. where this queſtion is glanced at there. *Vide* 50. *Edw.* 3. *pl.* 26. 39. *Edw.* 3. 21. 18. *Edw.* 3. 9.—And it was reſolved, that the writ ſhall abate. ANDERSON ſaid they were all reſolved, that as the writ is brought, it ſhall abate; and yet they agreed that a ſpecial writ lieth in this caſe for the executors. And the principal reaſon of their judgment was, becauſe the writ was *in nunc retardationem*, which cannot be of a diſturbance in the life of the teſtator (*a*).

A *quare impedit* lies by executors for diſturbance in preſenting to an arch-deaconry void in the time of their teſtator; but if they alledge it *in nunc retardationem* it ſhall abate. Poſt. 207. Co. Lit. 344.

(*a*) See this caſe revived, Poſt. 207.

CASE 5.

Bond *against* Richardſon.

Michaelmas Term, 30. & 31. *Eliz.* *Roll* 610.

Solvit ad diem is ſatisfied by proof of payment *before the day*.

1. And. 198. Owen, 45. 1. Leon. 311. Moor, 267. Cro. Car. 284. Cro. Jac. 435. 1. Bac. Ab. 426. 3. Bac. Ab. 710. Co. Lit. 212. b.

DEBT upon an obligation. The condition was for the payment of a leſſer ſum at a certain day and place. The defendant pleaded payment at the day and place according to the condition; upon which they were at iſſue; and it was found, that he paid it before the day, and at another place, and the plaintiff accepted it; and, For whom this verdict was found? was the queſtion.—ANDERSON, *Chief Juſtice*. It is no queſtion, but it is found for the defendant.—And afterwards in *Mich.* 31. & 32. *Eliz.* it was moved again; and then ANDERSON ſaid, they were all reſolved to give judgment againſt the plaintiff; for payment *before* the day is payment *at* the day. And thereupon it was adjudged, that the plaintiff ſhall be barred. (*a*) *Vide* 5. *Eliz.* *Dyer* 222. *contra*.

(*a*) By 4. Anne, c. 16. ſ. 12. if the principal and intereſt be paid before action brought, it may be pleaded in bar, though not ſtrictly paid according to the condition of the bond.

CASE 6.

Mills *against* Snowball.

A juror challenged and withdrawn, may be afterwards ſworn.

ENTRY SUR DISSEISIN. The parties being at iſſue, and the jury at the bar, one of the jurors was challenged by the demandant, and alſo by the tenant; and thereupon he was withdrawn. Afterwards, becauſe there were not jurors ſufficient, it was prayed that he might be ſworn; and by the aſſent of both parties he was ſworn by order of Court.—Upon evidence, it was held, that if a feoffment be made of divers lands, and of a houſe in which the feoffor doth dwell, and delivers the feoffment in the houſe, and ſpeaks nothing of the land, yet it is good of all; for they having an intent to give and take livery, this is a good feoffment; for they aſſembled there for that purpoſe.—It was held, that where one deviſeth land to his wife for life, remainder to his ſon and heirs, and if he dieth before his age of twenty-one years, that then it ſhall remain to *J. S.* in fee, and dieth; the ſon levieth a fine, and dieth before twenty-one years; *J. S.* ſhall have the land after the death of the wife; for it is a plain limitation.

Livery for part may be good for the whole. Ante 95.

Co. Lit. 48. a. 1 Wood's Com. 514.

A limitation. Ante 122. Poſt. 359.

CASE 7.

Anonymous.

It is a good plea to an action of debt by an executor, that the plaintiff is an *alien enemy*. Poſt. 683.

DEBT by an executor. The defendant pleads, that the plaintiff was an *alien nee* at *Ghent*, under the obedience of *Philip* king of *Spain*, enemy of the queen.—And it was held a good plea, though the action was brought as executor; and though no wars were proclaimed between this kingdom and *Spain*, by reaſon of open acts that he did as an enemy.

Co. Lit. 129. 46. Ld. Raylas, 641. 650. Owen, 45. Went. 15. Molloy, 870. Moor, 431. Carter, 49. 191. Skin. 370. Salk. 242. 283. 835. Foſter, 186. 2. Str. 1082. 3. Burr. 1739. 2. Bac. Abr. 376. Doug. Gilb. on Wills, 389. 1. Term Rep. 84.

CASE 8.

Green's Caſe.

In hue and cry by a maſter for a robbery on his ſervant, the information muſt be given by the ſervant, and not the maſter. Show. 94. 241.

ACTION upon the ſtatute of *Wincheſter*, for that one *Brook* his ſervant was robbed; and alledges, that the plaintiff himſelf came before a juſtice of peace, and was ſworn according to the 27. *Eliz.* c. 13. (*a*). After verdict, it was alledged in arreſt of judgment, that the ſervant was to be ſworn, and not the maſter.—And ſo was the opinion of THE COURT: for the ſervant might know the

Cro. Car. 38. 336. Cro. Jac. 224. 1. Leon. 323. 3. Mod. 238. 289. Salk. 613. Carth. 146. 2. Hawk. P. C. 117. 2. Saund. 380.

(*a*) See 8. Geo. 2. c. 16. 22. Geo. 2. c. 24.

persons when the servant was robbed, and the master was not in company: and the intent of the statute is, that he that had notice shall be sworn. And thereupon the judgment was staid.

Bease *against* Draiton.

Case 9.

DEBT upon an obligation. The condition was, that if *J. S.* makes an obligation to the plaintiff before *Michaelmas*, that then, &c. The defendant pleaded, that *J. S.* made the obligation, and sealed and delivered it to another as his deed, to the use of the plaintiff.—And it was adjudged, that it was no performance of the condition; for the meaning was, that it should be a good deed to the plaintiff, and perhaps the other will not deliver it to the plaintiff.

A condition to deliver a bond to the plaintiff, is not satisfied by the delivery of it to a third person to his use. Ante 54.

Cro. Car. 19. 77. Cro. Jac. 570. 1. Lut. 565.

Hare and others *against* Celey.

Case 10.

Hilary Term, 30. Eliz.

TRESPASS for breaking their close called *Church-field*, and metes and bounds it. The jury find a special verdict, that the place WHERE was sixteen acres lying in a field called *Church-field*, and meted it by other metes and bounds that were mentioned in the new assignment, of which *Hare* was seised in fee, and *eas exposuit* to the other three to sow at halves, *scil.* that he should find one half of the seed, and the other three the other half, and should manure the land; and that *Hare* should have one moiety of the grain there growing when it was reaped, and the others the other moiety; and after the land was sown, *A.* entered by the command of the defendant, and spoiled a great part of the corn. Upon which entry and spoiling, the action was brought.—First matter, If *Church-field* being found to be a great field, in which divers men had interest, if the sixteen acres in it may be called *Church-field?* And as to this THE COURT spake little.—Second matter, If this *exposing the land to half* be not a lease of the land, so as the action was to be brought in the name of *Hare* and the three?—Third, admitting it was a lease, if *Hare* be not tenant in common with them of the corn; for the moiety of that which was sown, was his?—THE COURT held it no lease of the land, but otherwise if it be for two or three crops: and therefore, as to the breaking of the close, *Hare* only was to bring the action; and as to the spoiling the corn, they ought to join, being tenants in common. But in that they joined in the action for breaking the close, whereas he ought to have brought it alone, it was adjudged the writ should abate.

"*Exposing to "half*" is no lease; it is only a liberty to plough and sow, but passes no interest; nor can the party have trespass for breaking the soil; but if the tenant in fee had *exposed it to halves* for several crops, it had been a lease. Post. 170. 530. 554. 729. Gouldf. 77. 2. Keb. 267. 1. Leon. 315. Cro. Jac. 384. Heb. 72. Cro. Car. 300. 2. Saund. 116. Jones, 360. Co. Lit. 198. 2. P. Will. 414. 3. Bac. Ab. 403. 5. Bac. Ab. 168.

Higgins *against* Mill.

Case 11.

In the Court of Chancery.

THIS case was referred to ANDERSON and WALMSLEY out of the Chancery, this term. *Higgins* being possessed of a term, deviseth his term to *Elizabeth* his wife, and to *Edward* his son, for their lives; and after to *Humphrey* his son, and the heirs males of his body, and died. *Elizabeth* and *Edward* entered by force of the devise, and died. *Humphrey* sold his interest of his term, and had issue *John*, and died. *John* sued for the term.—And they certified their opinions under their hands, that *John* had no right to the lease. ANDERSON did not shew his reason. But WALMSLEY shewed his reason to be, for that *John* cannot claim it as heir-male, for that is not good to convey the interest of a term to him. *V. Leonard Love's Case*, 10. *Co. ad finem.*

A chattel real cannot be intailed. Co. Lit. 20. a. 10. Co. 87. b. 1. R. Ab. 837. 1. Ch. Rep. 200. 1. Vent. 194. 2 Ch Rep. 233. 3. Ch. Cas. 30. Fearne, 345. 1. Peere Will. 290. 1. Bro. Ch. Cas.

Michaelmas Term,

31. and 32. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Robert Schute, *Eſq.*
Sir John Popham, *Knt.* *Attorney General.*
Sir Thomas Egerton, *Knt.* *Solicitor General.*

CASE 1.

The 5. Eliz. c. 23. extends to cauſes civil and criminal. Cro. Jac. 197.

Garrets *againſt* Fulwood.

IT was held by THE COURT, that the 5. *Eliz.* c. 23. is to be intended not only of excommunication for criminal cauſes, but in any other ſuits there for legacies, probate of wills, tithes, or other cauſe there.

CASE 2.

No *day is given* in ejectment for the writ of enquiry. Dougl. 198.

Matthew *againſt* Haſſel.

Michaelmas Term, 30. & 31. *Eliz. Roll* 49.

ERROR of a judgment in *ejectione firmæ* of a houſe in *London*, where judgment was upon confeſſion of the defendant.—Firſt error aſſigned was, that a writ of inquiry of damages was awarded, and no day given to any of the parties to be there at the time of the return; for the entry ought to be, *Ideo dies datus eſt partibus prædictis*, or at leaſt to the plaintiff; ſo that he might then pray his judgment.—*Sed non allocatur*; for the defendant is not to have day, and the plaintiff is to attend at his peril; and ſo is the courſe in the common pleas, but it is otherwiſe in the queen's bench.

"*Quod recuperet poſſeſſionem*" is a good judgment in ejectment. F. N. B. 220. Co. Lit. 285. Savil. 28.

The ſecond error, the judgment was, that *recuperet poſſeſſionem termini prædicti*, where it ſhould be *quòd recuperet terminum*, and ſo are all the books.—But THE COURT held it all one; for as in a real action, he is to recover ſeiſin; ſo in a perſonal, he is to recover poſſeſſion; and the writ is *habere facias poſſeſſionem*: and the judgment was affirmed. 3. Mod. 249. 5. Mod. 285.

CASE 3.

Judgment ſhall be given on a *cognovit actionem* notwithſtanding an error in the iſſue. Poſt. Cro. Jac. 435.

Long *againſt* Woodliffe.

DEBT upon an obligation, which bore date in *May*, 30. *Eliz.* and it was for payment of a leſſer ſum in *December*, 31. *Eliz.* The defendant pleads payment in *December*, 30. *Eliz.* according to the condition; whereas it ſhould be *December*, 31. *Eliz.* Iſſue was joined, *quòd non ſolvit*; and at the *niſi prius*, the defendant did confeſs the action. *Scit' quòd non poteſt dedicere actionem quin non ſolvet.* —HARRIS, *ſerjeant*, moved in arreſt of judgment, that this being no iſſue, the confeſſion that he had not paid, is not material; and ſo judgment cannot be given for the plaintiff.—But THE COURT held, that he having confeſſed the action, the words *quin non ſolvet* are not material, but ſurpluſage; and it ſhall be adjudged upon his confeſſion: and the plaintiff had judgment.

Hill

Hill *againſt* Tempeſt, and Rainsford *againſt* Mallet.

CASE 4.

Trinity Term, 31. Eliz. Roll 811.

ERROR of a judgment in the common pleas in treſpaſs of battery; and this was after verdict.—Firſt error. That the entry was, that the defendant appeared *per* HIGGINS, *attornatum ſuum*, leaving out his chriſtian name.—Second error. That after the iſſue, and *diſtringas* awarded, the action being brought againſt *Hill* and *J. S. J. S.* died before the laſt continuance; and judgment was given only againſt *Hill*.—But to this laſt error it was held, that the writ ſhould not abate, but it ſhall ſtand againſt the ſurvivor; and that the iſſue was well tried, although only one of them was living. 4. *Hen.* 7. 7. 21. *Eliz. Dyer* 175. (*a*).

Judgment againſt one defendant good, though the other died after iſſue, and before verdict. 1. Ld. Ray. 28. See this caſe as to the firſt error, more fully reported, poſt. 153.

(*a*) Vide Poſt. 574. 625. 652. 1. T. Rep. 637.

Hadman and Green *againſt* Ringwood.

CASE 5.

THE plaintiffs, as churchwardens of *Hotherſton* in *Norfolk*, brought treſpaſs for taking a bell out of the church in the time of their predeceſſors; and in truth it was in the time of *Edw.* 6. in the rebellion of *Kett* there. Upon not guilty pleaded, it was found againſt the defendant, and 50*l.* damages given.—GODFREY moved, that this action doth not lie by the ſucceſſor of the church-wardens, for they are not incorporate by that name; but the predeceſſor by reaſon of his poſſeſſion ought to bring the action, & *moritur cum perſonâ*. 19. *Hen.* 6. 6.—COKE *contra*, relied upon *F. N. B.* 91. & 8. *Edw.* 4. 6. for otherwiſe there is no remedy for the wrong; for the predeceſſor churchwarden cannot have action, his time being paſt: and ſo *primâ facie* THE JUSTICES did conceive, for the ſucceſſor ſhall have account againſt the predeceſſor (*a*).

Churchwardens may maintain treſpaſs for goods taken in the time of their predeceſſors. Poſt. 179. 2 Hawk. 145. 1. Hale, 512. Dyer, 99. 2. Hale, 181. Ld. Ray. 337. 11. Hen. 4. pl. 12. 12. Hen. 7. pl. 28.

Daliſ. 105. 1. Leon. 177. Cro. Jac. 234. Dyer, 99. 5. Mod. 395. (*a*) Vide 2. Strange, 852. in point. 2. Peer Will. 126.

Damport *againſt* Thatcher.

CASE 6.

ERROR of a judgment in the common pleas in an action of debt, and upon the judgment in the *ſcire facias* that iſſued upon it. The error aſſigned upon which the plaintiff relied was, that the judgment is entered, *viſis præmiſſis videtur curiæ*, that the plaintiff ſhall recover his debt; and ſo much for damages and coſts *de novo adjudicatis*; which was erroneous, for it is but a *videtur curiæ*, or the opinion of the Court, and no judgment by the Court, and then the judgment ſubſequent upon the *ſcire facias* is erroneous.—THE COURT held, that the firſt judgment was not erroneous, but that no judgment was given; and then the judgment in the *ſcire facias* is erroneous, and therefore they reverſed that: but as to the firſt, there being no judgment, they could not judge upon it; and the party had no remedy upon it; for it cannot be remanded to the common pleas to have judgment there given, but he muſt commence his ſuit *de novo* (*a*).

If the entry on the record be a *videtur curiæ*, a *ſcire facias* upon it againſt the bail is erroneous; and there being no judgment, the ſuit muſt be commenced *de novo*. Poſt. 215. 2. Leon. 1. Cro. Jac. 386. Strange, 441. 1. Term Rep. 279.

(*a*) A ſecond writ of error was brought in this caſe, and the opinion of the Court confirmed. Poſt. 215.

Case 7.

Lucy *againſt* Fiſher.

Eaſter Term, 31. *Eliz. Roll* 311.

On an iſſue whether lands are holden of a manor, the *venire* muſt be from both places. *Sed vide Poſt. note* (*a*) p. 260. 4. Bac. Abr. 393.

REPLEVIN, for taking his gelding in a cloſe of five acres of land in *Sporly*. The defendant made conuſance as bailiff of *Philip Audley*, *Eſq.* in the place WHERE; for that one *George Lether* was thereof ſeiſed in fee, and held them of the ſaid *P. Audley*, as of his manor of *Eaſthall* in the ſame county, by fealty and rent of eighteen-pence, and other ſervices, and for the ſaid rent arrear made conuſance as bailiff of the ſaid *Philip*, as in thoſe lands held of him. The plaintiff traverſed the tenure of the manor; and being at iſſue, it was found for the plaintiff.—TANFIELD moved in arreſt of judgment, that it was miſ-tried; for the iſſue being if the land in *Sporly* were held of the manor of *Eaſthall* in the ſame county, the trial ought to be by a jury of both vills; and here the *venire facias* was awarded *de vicineto Sporly* only, and ſo it was adjudged *Richmond v. Webb* (*a*).—Second exception. That he alledged that *George Lether* held the land, and afterwards avows as upon the ſtatute, which is not good; for when he meddles with the name of the parſon, ſo as he takes conuſance of him, he ought to avow on him by the common law, and not upon the land by the ſtatute.—But for that THE COURT held it well enough (*b*); but as to the firſt, it was a miſ-trial; for the *venire* properly ought to be of the manor, and of the place where the land lieth: but they gave day over to adviſe.

(*a*) Ante, 114. Avowry in Replevin.

Hob. 108.

(*b*) By 11. Geo. 2. c. 19. ſ 22. thoſe who diſtrain for rent or ſervices may avow generally. See alſo 4. Ann. c. 16.

Case 8.

Crickmere *againſt* Paterſon.

Trinity Term, 30. *Eliz. Roll* 568.

If a teſtator deviſe land *ad ſolvendum* or *paying* ſo much *per annum*, it is a condition. Poſt. 205. 378. 1. R. Abr. 410. 1. Leon. 174. Moor, 853. 2. Com. Dig. 439. 4. Bac. Abr. 323. Cowper, 841.

TRESPASS. Upon ſpecial verdict the caſe was, *Docking* ſeiſed of lands, and having iſſue two daughters, deviſed the land to the eldeſt and her heirs, that ſhe pay to her youngeſt ſiſter yearly thirty pounds. The queſtion was, If this was a condition?—And all THE JUSTICES held it was; for ſo is the intent of the deviſor, and otherwiſe the youngeſt ſiſter had no remedy for the rent.—WRAY and GAWDY held, that if the words were, "paying thirty pounds "to her ſiſter," this clearly is a condition, and ſo "*eâ intentione*," or "*ad affectum*," and his intent appearing, the law ſhall ſo adjudge it; and that the youngeſt daughter might enter upon a moiety, for which the action was brought. And it was adjudged accordingly. *Vide Co. Litt.* 236. *b.*

Case 9.

Ward *againſt* Blunt.

In trover if the defendant pleads property in himſelf, and that the plaintiff found and loſt them, whereby he ſeiſed them, it is *tantamount* to the general iſſue, and bad. Poſt. 174. 434. 485. Cro. Car. 157. Yelv. 174. 1. Hob. 305. Sav. 13. Cro. Jac. 185. 319. 10. Co. 88. b. Latch. 185. Salk. 654. Strange, 651. 5. Bac. Abr. 202.

ACTION upon the caſe *ſur trover*. And ſuppoſed that he was poſſeſſed of divers loads of corn and hay at *H.* in the county of *M.* and that they came to the hands of the defendant by trover, and he converted them to his own uſe. The defendant pleaded, that before the trover he was ſeiſed of certain land in *Burton* in the county of *Stafford* in fee, and the corn and hay was growing upon that land, and he cut them as his proper goods, and was of them poſſeſſed till he loſt them, and they came to the hands of the plaintiff by trover; and he loſt them again, and they came to the

hands

hands of the defendant; and he converted as it was lawful for him to do. And upon this the plaintiff demurred in law; for the plea amounts but to the general iſſue; and this cauſe was ſhewn for demurrer.—EGERTON moved, that the plea amounts to the general iſſue, for it is no more than that they were his proper goods, and then he ought to plead *non culp'*; and if it be a plea, he ought to traverſe WITHOUT THAT they were the goods of the plaintiff; for the plaintiff declareth that they were his proper goods, and he ought to anſwer it. 25. *Edw.* 3. 9. 22. *Edw.* 3. 18. 30. *Aſſ.* 22. 11. *Hen.* 4. 78.—ATKINSON *contra*. Although this plea amounts but to a general iſſue, yet he ſhould not have demurred, but ought to have moved the Court, (9. *Hen.* 6. 11. 19. *Hen.* 6. 21.) that he ſhould plead another plea, or a *nihil dicit* be entered; for demurrer being joined upon it, this is confeſſed, and then it is to be adjudged for the defendant.

WARD *againſt* BLUNT.

But THE COURT held, that inaſmuch as this is the ſpecial cauſe ſhewn upon the demurrer, it is good, and then ſhall be adjudged for the plaintiff: and afterwards the plaintiff had judgment.

Simms *againſt* Weſtcott.

CASE 10.

ASSUMPSIT. The plaintiff declares, that in conſideration that he at the requeſt of the defendant ſhould marry *Elizabeth*, the daughter of the defendant, he aſſumed to pay him 13l. 6s. 8d. after marriage when required, and ſhould have all the hemp growing upon ſuch land, and would give him a bed, and divers other things there expreſſed; and alledges *in facto* that he had married the ſaid *Elizabeth*, and the defendant had not paid the 13l. 6s. 8d. nor any of the other things. The defendant pleads a ſpecial plea, and traverſeth he did not aſſume *modo & formâ*. The jury found he aſſumed to pay 13l. 6s. 8d. but did not aſſume any of the other things.—And I moved that the verdict was found for the defendant; for when the plaintiff declares of an *aſſumpſit* to do divers things, and the jury find he aſſumed to do only one of them, the plaintiff hath failed in the *aſſumpſit*; for he ought to ſhew the truth of his caſe, and not to vary from it.—And ſo was the opinion of WRAY, SCHUTE, and CLENCH.—GAWDY *contra*; and cited 32. *Hen.* 8. *Br.* "*Verdict*" 90. But WRAY ſaid that book was no law, and the contrary had been adjudged in this Court.—Afterwards, GAWDY being abſent, it was adjudged for the defendant; but the Court allowed him no coſts; for WRAY ſaid that was in their diſcretion.

In an *aſſumpſit* upon *ſeveral* promiſes, if the jury find only *one of them*, the action cannot be maintained. B. R. H. 54. Cowper, 766. Dougl. 666. 1. T. Rep. 240. Poſt. 292. Ante, 79, 80.

Lembro & Hamper.

CASE 11.

THEY were indicted for perjury upon the 5. *Eliz.* c. 9.—TANFIELD took exception to the indictment, in that it was, *falsè & corruptivè depoſuere*, but not *voluntariè*; and although at the end of the indictment it is, *& ſic voluntarium commiſere perjurium*, yet this doth not help it.—And for this cauſe they were diſcharged.—GAWDY ſaid, although the verdict paſs againſt that which the witneſs depoſeth, ſo as no action lieth againſt him, yet he may be indicted for it.

Falsè et corruptivè is not ſufficient on the 5. Eliz. c. 9. without *voluntariè*. Poſt. 201. Cro. Jac. 508. 1. Hawk. P. C. c. 69. ſ. 17.

2. Hawk. 320. 3. Bac. Abr. 100. 817. Strange, 699. Rex v. Cox, Caſes in Crown Law, 69.

CASE 12.

Rither's Case.

Perjury in chancery is not within 5. Eliz. Ante, 137. 3. Inst. 166. Yelv. 120. 2. Leon. 201.

HE was indicted for perjury committed in his answer in the star-chamber, upon his examination to interrogatories there. And because these matters are not within the statute, for he was not examined as a witness between the parties, nor in *perpetuam rei memoriam*, he was discharged. 1. Hawk. P. C. c. 69. f. 20.

CASE 13.

Lane's Case.

In perjury it must be alledged that the question was material. Ante, 137. Rex v. Aylett, 1. Term Rep 69.

HE was indicted of perjury; for that upon an issue in such matter between parties he did falsly depose such a thing, &c. but sheweth not how the issue was, nor how the deposition trenched to the point of the issue: and he was discharged.

CASE 14.

Burton's Case.

Indictment for barratry *con. form. stat.* is good. Cro. Car. 340. 2. Roll. Ab. 79. Cro. Jac. 527.

HE was indicted as a common barretor *contra formam statuti.*—COKE took exception, that there is no statute that makes this an offence; but it was at common law; and the 34. *Edw.* 3. c. 1. doth not make this an offence, but appoints a punishment. —But it was held good, for so are many precedents. 2. Keb. 409. 2. Hale, 191. 1. Strange, 181.

CASE 15.

Sir Rowland Hayward's Case.

Indictment must be to the nusance of *all* the king's subjects. 5. Com. Dig. 166. 1. Hawk. P. C. 361.

HE was indicted for stopping of a highway, *ad nocumentum diversorum ligeorum dominæ reginæ.*—And because it was not "ALL "the queen's liege people," he was discharged.

CASE 16.

The Lord Dacre's Case.

Addition not necessary where outlawry does not lie. 8. Hen. 6. pl. 9. b. 1. Wilson, 244. 21. Hen. 6. pl. 24. 2. Hale, 178*.

HE was indicted for encroaching upon the highway; and exception taken, because it was not expressed of what place he was.—*Sed non allocatur*, for process of outlawry lieth not against him, but distress: and so it was ruled in the *Lord Pagett's Case*.

CASE 17.

Bullen *against* Grant.

If a copyholder surrenders to the use of his will, and devises for life or in tail, the reversion will descend to his heir, who may enter before admittance. Ante, 68. 90. Post. 307. 372. 442. 484. 747. Co. Lit. 60. b. 4. Co. 23. a. Gilb. Ten. 192 194. 1. Leon. 174. 2. Com. Dig. 493. 4. Bac. Abr. 299. 1. Wilf. 26. 1. Term Rep. 600.

TRESPASS. The case upon evidence was, *Hugh Bullen*, father of the plaintiff, being a copyholder in fee, surrenders the land to the use of his last will, and deviseth it to his wife for life, remainder to *G.* his son in tail, remainder to *T.* his son in tail. The lord admits *M.* and afterwards admits *G.* The wife dieth. *G.* dieth without issue. *T.* is admitted, and surrenders to the use of the defendant, and dieth without issue. The plaintiff before admittance, being heir at law to *H. B.* enters, and upon an *ouster* brings trespass.—First, It was held PER CURIAM, that the heir may enter without *admittance:* for WRAY said, when the surrender is to the use of his last will, this at first is the whole fee; but when he deviseth the land for life or in tail, and doth not meddle with the reversion, by this the reversion never passed out of him to the lord, but descends to his heir, and he shall have it without any admittance.—Secondly, It was held, that a surrender of tenants

in

in tail is no diſcontinuance, except the cuſtom be ſo: and although it was moved, that there can be no *eſtate tail* of a copyhold, except it be ſhewn that the lands had been given ſo, and always enjoyed; and that afterwards it had been enjoyed by them in the remainder and reverſion, and that their alienations did not uſe to bind, &c. for otherwiſe it ſhall be intended a fee; yet THE COURT held the contrary, that it ſhall be intended an eſtate tail, except the contrary be ſhewn, and that it is an eſtate tail, and ſo always uſed.

BULLEN *againſt* GRANT.

A ſurrender of a copyhold by a tenant in tail, is not a diſcontinuance.

Hedd *againſt* Chalener.

CASE 18.

THE caſe was, A *feme* copyholder takes huſband, who let the land for more years than the cuſtom doth warrant. The queſtion was, If this be a forfeiture to bind the wife, as a condition in law?—WRAY. If the huſband denieth to pay the rent, or to do ſuit at court, theſe are preſent forfeitures, which ſhall bind the wife, for they are things that the lord muſt of neceſſity have; but a leaſe is no great prejudice to the lord, and it is good to adviſe of it.—But SHURLEY and TANFIELD ſaid it hath been adjudged, that waſte is a forfeiture which ſhall bind the wife (*a*).

If the huſband of a feme copyholder makes a leaſe not warranted by the cuſtom, he forfeits only during his own life. Poſt. 505. 1. Roll. Ab. 509. 2. Roll. Rep. 344. Palm. 383. 4. Co. 27. a. Cro. Car. 7. 1. Ba. Ab. 303. 489. 3. Bac. Ab. 307. Gilb. Ten. 171. 243. Ld. Ray. 1000.

(*a*) Vide 9. Geo. 1. c. 29.

Muſtard *againſt* Hopper.

CASE 19.

ASSUMPSIT. The plaintiff declares, that in conſideration the defendant *ſhould enjoy* ſuch goods, &c. he would pay the party 25l. The jury, upon *non aſſumpſit*, find, that he promiſed to pay, *if he enjoyed* ſuch goods, &c.—And it was adjudged for the defendant, becauſe the plaintiff declared of an abſolute promiſe, and the jury find a conditional promiſe.

A declaration on a *poſitive promiſe* cannot be ſupported by evidence of a *conditional promiſe*. Ante, 79.

Dougl. 666. 1. Term Rep. 240.

Bradburne *againſt* Elizabeth Bradburne.

CASE 20.

ASSUMPSIT.—THE COURT held, where there are divers conſiderations alledged by the plaintiff, and ſome are frivolous and void; yet if any of them be good, the plaintiff ſhall recover. And it was ſo adjudged.

The plaintiff ſhall recover in *aſſumpſit* if any of the conſiderations on which he counts are good. Sed vide poſt. 759. 848 Cro. Jac. 110. 127. Dougl. 377. 730.

Royle *againſt* Bagſhaw.

CASE 21.

ASSUMPSIT. And declares, that in conſideration that he at the requeſt of the defendant would deliver as many quarters of malt to *J. S.* to his uſe, as he would receive and have before ſuch a day, the defendant promiſed to pay *tales denariorum ſummas, &c.* before the firſt day of *Auguſt*; and alledges in fact, that he delivered ſo many quarters of malt, *viz.* each of ſuch value, &c. And upon *non aſſumpſit*, for part and payment pleaded for the reſidue, it was found againſt the defendant.

A promiſe to pay *tantum quantum meruit* with an averment *quod meruit tantum* is ſufficient without ſaying *to whom*.

LEWIS moved in arreſt of judgment.—Firſt, It is not alledged *to whom* the money ſhould be paid. *Sed non allocatur*; for it ſhall be intended to the plaintiff.—Second, The promiſe is uncertain, for he doth not promiſe any ſum, but *tales denariorum ſummas*, but ſaith not what, &c. *Sed non allocatur*; for WRAY ſaid, when the

Aſſumpſit lies on two conſiderations, though one of them be void. Cro. Car. 77. Poſt. 848. 1. Roll. Ab. 30. Poph. 182. Noy, 83.

ROYLE *againſt* BAGSHAW.

plaintiff afterwards ſhews the value of every quarter, it ſhall be intended he ſhall pay according to that rate, and ſuch general *aſſumpſit* is good.—Third, There are two iſſues; the one, *payment*; the other, *non aſſumpſit*; and the jury find for both, *quòd aſſumpſit*; whereas they ſhould find for one, he did not pay; and for the other, that he did aſſume.—But becauſe upon the *doreſe* of the *poſtea* it appeared that the jury found both iſſues againſt the defendant, and it is but the miſpriſion of the clerk of aſſizes, the record was re-bailed to him to amend it; which he did: and the plaintiff had judgment.

Cro. Car. 77. Cro. Jac. 263. 370. 1. Roll. Ab. 24. 1. Sid. 446. 1. Mod. 43. Hard. 3. Yelv. 134. 1. Lev. 3. 88. 3. Bl. Com. 161.

Ante, 112. 1. Salk. 47. 53.

CASE 22.

Sir Anthony Sturleyn *againſt* Albany.

Hilary Term, 31. *Eliz. Roll* 668.

What is a ſufficient conſideration to ſupport an *aſſumpſit* for a rent charge granted out of a manor. *Ante*, 67.

ASSUMPSIT. The plaintiff declares, that the *Earl of Arundel* granted to him a rent of forty pounds out of the manor of *Whittington*, and after conveys the manor to the defendant and his heirs; and that he 24. *Mart.* 22. *Eliz.* promiſed to the plaintiff, that if he would ſhew him a deed by which it ſhould appear that he was to pay the rent, that he would pay to him all the arrears of it, and all that ſhould be arrear after; and alledges that he 27th *April*, 27. *Eliz.* ſhewed a deed to the defendant, by which it appeareth that he ought to have the rent; and for eighty pounds arrear for two years laſt paſt, he brought his action. The defendant pleads, that after the promiſe, *viz.* 2d *July*, 22. *Eliz.* the plaintiff entered into the manor, and let it to *J. S.* for years. The plaintiff replieth, that 1ſt *Decemb.* 27. *Eliz.* the defendant re-entered, and for the arrearages after he brought the action: and upon the re-entry the iſſue was joined; and found againſt the defendant.

1. Leon. 297. Cro. Car. 70. 1. Bac. Ab. 170. 2. Com. Dig. 532.

GLANVILE, *ſerjeant*, took divers exceptions to the declaration. —Firſt, becauſe by the entry into the manor, the promiſe which was before, and the action upon it, is ſuſpended; and being once ſuſpended, it is gone for ever.

Cro. Car. 373.

WRAY, C. J. The action is brought for the two laſt years, which were after the re-entry, for which he had no cauſe of action before; and therefore cannot be ſuſpended *omnino*.

GAWDY. It is not material when the arrears were due; for the cauſe of action, "the promiſe," was then *in eſſe*, which is ſuſpended if the cauſe be ſo; but here the *aſſumpſit* is collateral, and is not ſuſpended by the entry into the manor; for it is not iſſuing out of the land: but if the plaintiff had releaſed all actions before the deed was ſhewn, and then the deed is ſhewn; yet the plaintiff ſhould be barred, for the promiſe was before the releaſe.

Co. Lit. 292. b.

Second exception. Becauſe the deed was not ſhewn in convenient time; for it was five years after, and ſo divers arrearages due. —*Sed non allocatur*; for it is the better for the defendant, the longer the time is before the ſhewing of the deed: but if the promiſe had been, that upon ſhewing the deed, to pay all that ſhould be due at *Michaelmas*, there the deed muſt be ſhewed before *Michaelmas*.

Third exception. The promiſe is, If he ſhew a deed by which it appeareth he ought to pay the rent, he will pay it; and the plaintiff ſheweth that he did ſhew a deed, by which it appeareth he ought to have the rent, and ſo meets not with the conſideration.

tion.—And of that opinion was GAWDY; but the other Juſtices *è contra:* for it is in the declaration, which, by the ſtatute, is not to be overthrown for default of form, and ſo is well enough. SHURLEYN *againſt* ALBANY.

Dobbin's Caſe. CASE 23.

Trinity Term, 31. Eliz. Roll 562.

ASSUMPSIT. The plaintiff counts, that whereas he claimed to have a title to certain land in *D.* the defendant, in conſideration that the plaintiff aſſumed to aſſign his right, title, and intereſt to the defendant, he aſſumed to pay him forty pounds, &c. And after verdict it was alledged in arreſt of judgment, that this was an unlawful conſideration, and againſt the ſtatute of 32. *Hen.* 8. c. 9. for it appeareth not that the plaintiff was in poſſeſſion by the ſpace of a year before, ſo that he could aſſign to the defendant, nor that the defendant was in poſſeſſion, that he might releaſe to him.—*Sed non allocatur*; for it ſtands indifferent whether he was in poſſeſſion or not, and a declaration ſhall not be avoided but for great cauſe. And the plaintiff had judgment. *Aſſumpſit* in conſideration of aſſigning land, is good, though it does not appear that either plaintiff or defendant were in poſſeſſion for a year before.

White's Caſe. CASE 24.

PROHIBITION. The plaintiff ſuggeſts, that by the ſtatute of 21. *Hen.* 8. c. 6. no mortuary ſhall be paid but in ſuch places where it ought to be paid before the making of the ſtatute; yet he was drawn into the ſpiritual court againſt the ſaid ſtatute. And prohibition was granted; and LOVE ſaid, ſo it was adjudged in 16. *Eliz.* Prohibition to a ſuit for the payment of a mortuary. Lut. 1069. Cro. Car. 238. 3. Mod. 268. 1. T. Rep. 552.

Smith *againſt* M. Collins and three others. CASE 25.

EJECTIONE FIRMÆ. After iſſue joined, the record of the *niſi prius* was at the ſuit of *S.* againſt *M. Sharpe* and three others; and found for the plaintiff: and this matter was alledged in arreſt of judgment, and that there was no trial between the plaintiff and defendant.—Adjudged, *quòd plaintiff nihil capiat per billam.* A variance of the defendant's *name* in the *niſi prius* is fatal. 1. T. Rep. 782.

Scarlet's Caſe. CASE 26.

TRESPASS. Verdict for the plaintiff.—BARTLETT alledged in arreſt of judgment, that the *venire facias* was, "*et habeas ibi hoc breve*," and ſaid not "*nomina juratorum*," ſo that the ſheriff had no warrant to impanel a jury. Alſo it was *libratas pro libras.*—*Sed non allocatur*; being within the ſtatute of jeofails. And it was adjudged for the plaintiff. Defects aided by the ſtatute of jeofails.

Wiggely *againſt* Bradſhaw. CASE 27.

Hilary Term, 31. Eliz. Roll 406.

ERROR. *Bradſhaw* had judgment to recover by confeſſion in debt, but had no judgment to recover damages: and for this cauſe the judgment was reverſed. Judgment reverſed.

Molton's Caſe. CASE 28.

COKE demanded the opinion of THE COURT in this caſe. —*Molton*, being tenant in tail, had iſſue two ſons, *Richard* and *John*, and dieth. *Richard* levieth two fines of the land, and dieth without iſſue. *John* brings two writs of error upon theſe fines. The defendant to the firſt fine pleads the ſecond fine not reverſed; Fine. 1. R. Ab. 788, 2. Leon. 211. Moor, 366. 1. R. Rep. 306. Bridg. 77.

Molton's Case.

reverſed; and to the ſecond he pleads the firſt not reverſed. The queſtion was, What is to be done?—Curia. You may reply, that the ſaid fine pleaded in bar is alſo erroneous, and ſo aid yourſelf. 7. *Hen.* 4. *pl.* 39.

Case 29.

Beſome *againſt* Crooke.

Trinity Term, 31. *Eliz. Roll* 763.

If an inferior court diſallow a writ of privilege, or do not enter a bond on *oyer* craved, it is error. 8. Co. 141. 2. Brownl. 101. Vaugh. 154. 2. Buril. 36. Stiles, 373. 2. Ch. Caſ. 65. Salk. 544. 6. Mod. 202. 4. Bac. Ab. 224.

ERROR of a judgment given in *Southampton* in debt upon an obligation.—Firſt error. For that at a court held 9th *Novemb.* the defendant brought his writ of privilege; and the mayor being abſent, the bailiffs allowed it, and gave day till the next court, when the mayor being preſent did diſallow it; and for default of anſwer, *nihil dicit* was entered.—Coke ſaid it was a plain error; for after the writ delivered they could not proceed. 6. *Hen.* 7. *pl.* 6. And if it be ſaid the bailiffs are not judges, then they cannot hold a court; and then the day given by them is null, and ſo is a diſcontinuance.—Second error. Oyer being demanded of the obligation and condition, this is rehearſed *in hæc verba*, but are not entered; ſo it appeareth not the plaintiff had title.—For theſe cauſes the judgment was reverſed.

Case 30.

Palmer *againſt* Thorpe.

A. lets a manor for 30 years; and the next day lets it to another for 40 years to commence at *Mich.* next after the date. This paſſes a reverſionary intereſt. Poſt. 287. 2. Co. 74. 1. Co. 155. 3. Bac. Ab. 438. and the caſes there cited. Dougl. 53.

THE caſe was, *A.* let the manor of *D.* to *B.* for thirty years, and the next day lets it to another for forty years, to commence at *Michaelmas* next after the date; the tenant doth attorn. The queſtion was, If it be a good grant of the reverſion, being to commence at a day to come?—Gawdy. A reverſion for years cannot commence at a day to come, for then the grantor ſhall have a leſſer eſtate in himſelf.—Wray, C. J. The reverſion being for years is a chattel which may well expect; and if I have a rent in fee, I may grant it for years to commence at *Michaelmas*; for an eſtate doth not paſs, but an intereſt.—Coke. It hath been adjudged, if a man grants his term from *Michaelmas*, it is good; for it is as a leaſe from *Michaelmas*.

Case 31.

Cadee *againſt* Oliver.

Huſband and wife make a leaſe by indenture for years, the land being bound in a ſtatute; they afterwards levy a fine of the reverſion. S. C. reported at large, 3. Leon. 153. 154. Cro. Car. 598. 2. Roll. Ab. 48.

EJECTIONE FIRMÆ. It was found by ſpecial verdict, that *Lord Montjoy* being ſeiſed in right of his wife, was bound in a ſtatute of two thouſand pounds, 6. *Eliz.* to *Sir Lionel Ducket*, and after let the land to *Hoſkins* for twenty-one years, and after let the land to *J. Cadee* for ninety-nine years, to commence immediately. In 12. *Eliz.* the land was extended upon the ſtatute at fifty-three pounds *per annum*. *Lord Montjoy* and his wife grant the land to *Perry* in fee, and during the extent *J. Cadee* grants the term to his ſon. *Lord Montjoy* died, the ſon enters upon the conuſee of the ſtatute, &c.—Two queſtions aroſe. Firſt, If the grant of the term by *J. Cadee* during the extent be good? Secondly, If the leſſee may enter upon the conuſee of the ſtatute without a *ſcire facias*? Cooper *argued pro plaintiff*; Harris *pro defendant*.—Harris ſaid, it had been reſolved by the opinion of the two Chief Juſtices, that the grant of the term was void, for the extent might continue longer time or ſhorter, and ſo might continue longer than the ninety-nine years.—*Et adjournatur* (*a*).

(*a*) See 3. Bac. Abr. 308.

Hill,

Hill, Rainsford, and Tempeſt, *againſt* Mallet.

CASE 32.

Trinity Term, 31. Eliz. Roll 811.

ERROR of a judgment in the common pleas in treſpaſs and battery.—Error, that the entry is, that the defendant appeared *per* HIGGINS, *attornatum ſuum.*—COKE. This is merely the default of the clerk, which is helped by the 32. *Hen.* 8. c. 30. and if it had been *per attornatum ſuum* it had been good.—But this was denied: and THE COURT held that it is no appearance, for want of the chriſtian name of the attorney, for there may be divers attornies named *Higgins*; and if one appeareth for another as attorney without warrant, an action upon the caſe lieth, which cannot be here. 1. *Mar. Dyer*, 93.—WRAY, C. J. ſaid, if there were any warrant of attorney, and his name appeareth there, it may be amended; but as it is, the judgment is erroneous.—FERRERS moved, that there was a warrant of attorney in the common pleas, in which his name appeared; and prayed the Court to award A WRIT *ex officio* to certify it, as 9. *Edw.* 4. 3. 11. *Hen.* 4. 92.—WRAY, C. J. In the caſe *Lord Norris v. Braybrooke*, it was much debated; and there, after *in nullo eſt erratum* pleaded, it was granted; for this plea goeth to a thing contained in the body of the record: and the writ was granted.

An appearance entered in the *ſurname* only of the attorney, is not amendable after verdict; but on error brought, A WRIT may be awarded to ſearch for *the warrant*, and if his name be right there, it may be amended.
Ante, 59. 75. 84. 145. Poſt. 177.
1. Roll. Ab. 289. Cro. Jac. 6. Ld. Ray. 28. Dougl. 134.

Lee *againſt* Curveton.

CASE 33.

Trinity Term, 31. Eliz. Roll 902.

ERROR in debt upon bond. The defendant pleaded *non eſt factum*; and it was found againſt him. The plaintiff did count *per factum ſuum obligatorium*, but ſaith not *curiæ hic prolatum*; and this was aſſigned for error.—COKE. This is but matter of form, which makes not an error after verdict; and the clerk of himſelf might have put it in, without any inſtruction of the party (*a*).—Second error. That the judgment ſhould have been, *quòd capiatur*, and the judgment is, that *de fine nihil, quia pardonatur*, whereas in truth the plea was pleaded after the general pardon.—COKE. Perhaps he was ſpecially pardoned.—But it was held, that ſhall not be intended: and for this laſt error the judgment was reverſed.

Omiſſion of the *profert* in *debt* on bond is not material.
Poſt. 217. 10. Co. 94. Cro. Jac. 32. Carth. 138. Stra. 529. 816. 1272. Dougl. 4.
A ſpecial pardon muſt be pleaded. 1. Leon. 300. Lane, 71. 1. Wilſ. 214. 5. Com. Dig. 320. 2. Bac. Abr. 515. 2. Hawk. 511. Caſes in C. L. 102.

(*a*) See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

Billingham *againſt* Mynors.

CASE 34.

Trinity Term, 31. Eliz. Roll 95.

ACTION for words, *viz.* "Thou art a traitor," ſpoken at *Welſden* in *Suſſex*. The defendant pleads, that he ſpake theſe words at *S.* in *Hampſhire, viz.* "ſuch things traitors do," ABSQUE HOC that he ſpoke the words at *W.* in *S.* and upon this it was demurred.—After being argued by LUCKNER, it was held clearly by THE COURT, that the juſtification was ill, and the traverſe upon it, for the action is general and tranſitory; and the defendant doth not juſtify the words in the declaration. And the plaintiff had judgment.

In tranſitory actions the defendant cannot traverſe the place laid in the declaration.
Co. Lit. 282. b. Ante 99. 4. Bac. Ab. 517. 2. T. Rep. 29.

Honeywood *againſt* Huſbands.

CASE 35.

ACTION upon the caſe, for diſturbing him of his common appendant to his land. And declared that *A.* was ſeiſed of the

An action, by a leſſee for years, for diſturbance of common, muſt ſhew the right and intereſt of the leſſor, and that the leſſee has a diſtinct title. Dougl. 667.

Henlywood *against* Husbands.

land for life, remainder to *B.* in tail, remainder to the right heirs of *B.* and that time out of mind, &c. they had common in this land, for themſelves, farmers and tenants; and that the ſaid *A.* and *B.* let the land to him for years, whereupon he put in his cattle, and was diſturbed, &c. After judgment given againſt the defendant upon *nihil dicit*; and a writ awarded to enquire of damages, and returned; Pepper moved divers exceptions to the declaration (the judgment being the ſame term).—Firſt, Becauſe he ſheweth not how the particular eſtate begun. 20. *Edw.* 4. *the Caſe of a Corody.*—Secondly, The preſcription cannot be by the particular tenant; and here he joins the particular tenant and the remainder.—Thirdly, He counts that the particular tenant and he in the remainder did demiſe; whereas it is but the *confirmation* of him in remainder.—Fourthly, He doth not aver the life of the tenants for life.—Topham *contra.* And he moved, that inaſmuch as the judgment was given before, and a writ of enquiry of damages, no exception can be taken to the declaration; upon which judgment was given.—But the Court held the contrary; for no abſolute judgment was given: for upon the writ of enquiry of damages returned, a new judgment is to be given, which is the perfect judgment, before which any thing may be ſhewn to ſtay judgment, and againſt the declaration: and ſo it was ruled.—And as to the *firſt* exception, Topham ſaid, it was not material, for it is but a conveyance to the action; and he is a ſtranger to the eſtate. 1. *Hen.* 5. *pl.* 4.—*Secondly*, The preſcription is good, for the particular eſtate and the remainder is but one eſtate.—*Thirdly*, It is the leaſe of both. 27. *Hen.* 8. *pl.* 11.—*Fourthly*, The life of the tenant for life needs not to be averred, for it is the leaſe of one that had the inheritance.—Gawdy held the count good.—Wray, *Chief Juſtice.* The third and fourth exceptions are not material; but for the firſt, the count is not good, for the plaintiff muſt, ſufficiently entitle and enable himſelf to the action, which he pretends to be becauſe of his intereſt in the land; and then he muſt ſhew a ſufficient right and intereſt in his leſſors: and to the ſecond, he ought to make a diſtinct title to the common, and not confound them as he hath.—*Et adjournatur.*

Ante 18. 5. Com. Dig. 78. Co. Lit. 45. a. Poſt. 253. 701. 5. Com. Dig. 51. Ante 112.

Case 36.

Tytherley *against* Welſh.

Eaſter Term, 31. *Eliz. Roll* 310.

If a defendant die after judgment and before execution, it is *error* if the plaintiff's attorney ſue a *ſcire facias* againſt his executor without a *new warrant.* 2. Inſt. 471. Carth. 112. 193. 4 Bac. Ab. 409. See 1. Cromp. Practice, 105. to 109.

Error. The caſe was, The defendant had recovered againſt the teſtator of the plaintiff in debt, and after judgment, and before execution, the teſtator dieth. The attorney of the plaintiff in the action of debt ſueth *ſcire facias* againſt him that is now plaintiff, to have execution without any new warrant, and recovers: and this was aſſigned for error.—Godfrey moved it was not error, for the attorney was not diſcharged by the judgment, but may well ſue execution within the year. 33. *Hen.* 6. *pl.* 49. 34. *Hen.* 6. *pl.* 51.—Gawdy, *Juſtice.* It is true that the attorney may pray execution, but this is a new action againſt the executor; and it is againſt another perſon than againſt whom his warrant was.—And after for this cauſe the judgment was reverſed (*a*)

(*a*) By 8. & 9. Will. 3. c. 11. ſ. 6. if a defendant die after interlocutory and before final judgment, in any action originally maintainable againſt executors, &c. the plaintiff ſhall have a *ſcire facias* againſt his executors, &c.

Perſon *againſt* Hickled.

CASE 37.

Trinity Term, 31. Eliz. Roll 66.

ERROR of a Judgment given in the common pleas, *Mich.* 30. & 31. *Eliz. Rot.* 3021. in an *aſſumpſit*; where the plaintiff counts, that in conſideration he by his ſervant had delivered to the defendant two bills of debt of three hundred *French* crowns, amounting to eighty pounds, to be received at *Roan* in *Normandy* to his own uſe, he ſuch a day, &c. aſſumed to pay him ſixty-one pounds. Upon *non aſſumpſit*, it was found for the plaintiff; and he had judgment.—Error was aſſigned; for there is no conſideration to charge him, for it appeareth not how he ſhould recover them, if he be denied payment, nor that they were bills made to the plaintiff, nor what benefit he may have upon them.—And theſe matters were alledged in the common pleas in arreſt of judgment, as it was alledged by GODFREY, and confeſſed by FERMOR, *ſerjeant*; and yet they gave judgment for the plaintiff, that it was a good conſideration, and well alledged.—And ſo THE COURT held here. But *adjournatur*. *V. poſtea, Hill.* 32. *placito* 8.

An *aſſumpſit* will lie upon the *ſale* and *delivery* of bills of debt; but it muſt be alledged for what and to whom the money is due on them. See poſt. 170. 1. Salk. 25. 8 Mod. 267. 2. Stra. 1211.

Yates *againſt* Windham.

CASE 38.

Vide Ante, page 64. *Caſe* 10.

ERROR.—After the errors were examined the plaintiff diſcontinued his writ; and becauſe there was a manifeſt error in part of the record which remained in the common pleas, he obtained a writ out of the chancery to ANDERSON, C. J. to remove the reſidue of the record; which writ is in the *Regiſter* 216. And this part of the record being removed and ſent into the queen's bench, he brings a new writ of error, *coram vobis reſidet*, and would aſſign error upon the new part of the record removed.—COKE moved, that this writ is not warranted by any courſe, for this is to alledge diminution after *in nullo eſt erratum* pleaded, and then ſhould be infinite, which the law will not ſuffer; and this courſe is not a writ of error to proceed upon the firſt record, for then it ſhould not vary from it, for all ſhall be entered upon the firſt roll, but here it ſhall be upon a ſeveral roll, which is not by any means warranted.—TANFIELD. We have ſued a ſpecial writ to remove the reſidue of the record, and another writ to the Court to proceed upon the whole record which is now in court, which is a ſpecial writ upon our caſe; and all that is removed is but one record; and all being removed, we cannot have any other writ; and ſo is not infinite.—And at another day being moved again, COKE ſaid, the writ which is now brought, is but a writ of diminution which ought to iſſue out of this court, for this is the writ of diminution in *Fitzherbert*, 25. and the plaintiff after a *ſcire facias ad audiendum errores*, ſhall not have a writ of diminution; for he is to ſee that the record be full before he ſueth his *ſcire facias* upon it, and the defendant after *in nullo eſt erratum* pleaded, ſhall not alledge diminution, as the books are; and then it ſhall be a great miſchief if the defendant ſhall have no means to alledge diminution, that yet the plaintiff by his own act ſhall have it

A writ of error *coram vobis* cannot be brought to alledge diminution after *in nullo eſt erratum* pleaded. Poſt. 281. Latch. 198. Cro. Car. 575. Carth. 369. 1. Vent. 107. 2. Bac. Abr. 218. Ld. Raym. 151. Salk. 337. Stra. 690. Ante 84. Poſt. 281.

YATES *againſt* WINDHAM.

it by diſcontinuing his writ of error; and a writ of diminution ought to be awarded out of the court where the record is, and not out of chancery.—TANFIELD. A writ of diminution doth alledge a certain parcel of the record which is not certified; but here no part in certain is alledged, but generally *reſiduum recordi*; and therefore it is not a writ of diminution. But admitting it be not well removed, yet is it not material; for being here, it is to be examined by the Court; as if an indictment be erroneouſly removed, yet being in court, it ſhall be proceeded upon. 7. *Edw.* 4. *pl.* 22. 9. *Edw.* 4. *pl.* 32. The Court *ex officio* in ſome caſes ought to award a writ of diminution, where the party is eſtopped. —And all THE JUSTICES held that this is but a writ of diminution, for it is the ſame writ that is in *Fitzherbert*, and diminution cannot now be alledged, as 22. *Edw.* 4. and other books are, and this being awarded out of chancery cannot be a warrant to this Court; and ſo this Court cannot proceed upon it, nor is it to regard it being brought hither without warrant, *viz.* by a writ which is void, and ſo cannot examine errors upon it: but when ſuch writ is to be awarded, and there is error in it, and the record is by it removed, it is otherwiſe, as 9. *Hen.* 6. *pl.* 4. But becauſe the party had not appeared, they commanded he ſhould appear; and then plead or demur to it, and they would make a rule in it. *V. poſtea Trin.* 34. *B. R. placito* 2.

CASE 39.

Sweeper *againſt* Randal.

Trinity Term, 30. *Eliz. Roll* 770.

What words will amount to a ſurrender. Poſt. 486.

TRESPASS for taking his corn. Upon not guilty pleaded, the jury found that *J. Gilbert* let the land to the plaintiff at will, and afterward he agreed with *J. Gilbert ad ſurſum reddendum* the land and his intereſt in it to him, and that he entered and let it to the defendant, who took the corn. The queſtion was, If this was a ſurrender, *viz.* "I agree to ſurrender my land?" and whether it imports an act to be done *in futuro* or in the preſent time?—GAWDY. This can be no ſurrender, but a relinquiſhing of his eſtate, if theſe words be any thing; for tenant at will cannot ſurrender no more than he can grant; but he conceived it was an act to be done *in futuro*. —WRAY. If I agree to let my land, this is no leaſe; no more ſhall this be a relinquiſhing of his eſtate.—SCHUTE agreed with them.—CLENCH. It ſeemeth the intent of the party was to relinquiſh the eſtate at the time of the ſpeaking, for otherwiſe the words were void, for he may leave it at any time.—GAWDY. If his intent was ſo, the jury ſhould have found it expreſsly, but they had not done ſo.—And the plaintiff had judgment.

Co. Lit. 55. 337. 2. Vent. 206. 7. Mod. 208. Stra. 1201. Ld. Ray. 1145. 2. T. Rep. 441.

CASE 40.

Davies *againſt* Thomas.

Accord and ſatisfaction. 3. Com. Dig. 97.

DEBT upon a bond. The condition was to ſecure him harmleſs againſt *J. S.* in an action for fifty-three pounds, for which he was bail for him. The defendant pleads he had paid to *J. S.* twenty pounds in ſatisfaction of the fifty-three pounds, and ſo he kept him harmleſs.—But for that the plaintiff might be damnified before the payment, to which he doth not anſwer, the plea was held ill; and the plaintiff had judgment. *Vide* 38. *Hen.* 6. *pl.* 13.

Babington

Babington *againſt* Babington.

CASE 41.

DEBT. The defendant pleads a foreign attachment in *London*, which was after appearance and pending the action.—And after adviſement, it was ruled to be no good plea; but no cauſe was ſhewn, and the defendant had a day to plead peremptory, or a *nihil dicit* to be entered.—WRAY ſaid, this will be a precedent for the time to come.

"Foreign attachment" after appearance is no plea in debt. Ante, 101. Poſt. 593. 691. 713.

1. Roll. Abr. 552. 1. Bac. Abr. 692.

Landydale *againſt* Cheyney.

CASE 42.

Hilary Term, 31. *Eliz.* *Roll* 638.

COVENANT. The caſe was, Tenant for life made a leaſe for years. The leſſee by indenture grants, bargains, and ſells all his eſtate, to have and to hold *in tam amplis modo et formâ*, as he ought to hold it. Leſſee for life dieth; he in the reverſion enters; and the bargainee brought a writ of covenant againſt the bargainor.—GODFREY argued that the action did not lie, for here is no garranty in deed or in law, but only a grant or aſſignment of his intereſt, which doth not imply any warranty; and if there be any warranty, yet the action lieth not, for the covenant doth determine with the eſtate; and ſo is 32. *Hen.* 6. *pl.* 32. 9. *Eliz.* *Dyer* 257. So if tenant in tail makes a leaſe for years, and dieth without iſſue, the covenant doth determine with the eſtate.—And of that opinion was THE COURT; and WRAY ſaid it was a ſtrong caſe. And becauſe none came of the plaintiff's part, it was adjudged for the defendant.

Tenant for life makes a leaſe for years. The leſſee bargains and ſells. The bargainee cannot bring covenant againſt the bargainor on the entry of the reverſioner. Poſt. 615. Moor, 74. 1. And. 12. Bendl. 150. Dyer, 257. 1. Leon. 179. Lit. Rep. 334. 1. Wood Con. 452.

Etnam *againſt* Tottam.

CASE 43.

DEBT upon a ſingle obligation of thirty pounds. The defendant pleaded payment of three pounds *pendente billâ*; and demands judgment of the bill.—But becauſe he pleaded it without any *ſpecialty*, the plaintiff had judgment.

Part payment to a bond *pendente billâ* without a ſpecialty is a bad plea. Poſt. 455.

Co. 5. 43. a. 2. Salk. 518.

Benington *againſt* Benington.

CASE 44.

TRESPASS for entering into his houſe and land. The defendant pleaded it was the freehold of *Joan Benington*, and he entered as her ſervant, and by her commandment; and the iſſue was, If it were her freehold or not? The jury found it was the freehold of the plaintiff for two parts, and the franktenement of the ſaid *Joan* for the third part. The queſtion was, If the plaintiff ſhould have judgment upon this verdict?

THE COURT held clearly, he could not; for although the iſſue is found againſt the defendant, *viz.* that all was not the freehold of *J. B.* yet it appearing a tenancy in common, ſo that the plaintiff cannot maintain this action, judgment ſhall be given againſt him.—And it was adjudged for the defendant.

Upon an iſſue, Whether it was the defendant's freehold? if the verdict find they were tenants in common, the plaintiff ſhall be nonſuited. Poſt. 170. 5. Com. Dig. 167. B. R. H. 54. Dougl. 666. 668. 1. Term Rep. 240.

Lord

Case 45.

Lord Stafford *against* Thynne.

Quære, If a non-suit on *one* issue in a writ of error, is a non-suit of the whole? Post. 170.

Barnes, 318.

ERROR upon a judgment in an assise; and assigned one error *in fait*, *viz.* that the land lay in *D.* in the county of *Monmouth*, and not in the county of *Salop*, where the assise was taken. Upon this issue was joined; and at the *nisi prius* the *Lord Stafford* was *non-suited*; and this was now returned.—Coventry prayed that they might have execution in the assise, and that judgment might be affirmed; for being non-suited for one error, this is a non-suit in the whole writ of error.—Wray. If there be error in the record, we cannot affirm it; but it shall remain as it is, and we will advise.

Case 46.

Procter *against* Tayler.

Outlawry reversed.

ERROR to reverse an outlawry which was sued against him for costs.—The first error. That ten shillings was awarded to the defendant upon non-suit *pro damnis suis*; whereas it should be *pro missis et custagiis suis*. And this was held to be error.—Second error. That the sheriff did not return the day when one of the counties was held, as he ought; for it ought to appear to the Court when every county was held, that it may appear there were so many days between every county court as is appointed by the statute (*a*).—And for these causes the judgment was reversed.

(*a*) 2. Edw. 6. c. 25.

Case 47.

Shelbury *against* Bird.

Hilary Term, 31. *Eliz.* *Roll* 120.

A writ of *droit close* directed *ballivis villæ*, &c. is good; but if against an infant, the admission of guardians must be *per Curiam*. Post. 172.

ERROR upon a judgment given in *Colchester*.

First Error. That the writ of *droit close* was directed "*ballivis villæ de Colchester*," whereas it should be "*ballivis suis*;" for they are the queen's baylies; and it is not sensible that it should be directed *ballivis villæ*.—Coke. All the forms of the writs are so, and it is therefore good.

Second Error. The action is brought against an infant, who appears by his guardian, and no warrant appeareth for it; for the entry in such case is, *quòd talis admissus est per Curiam*. 3. *Hen.* 6. *pl.* 17. *Fitz. N. Brevium*, 27. *i.* 16. *Hen.* 7. *pl.* 5.—Coke. This is error *in fait*, and in the common pleas the entry is *per custodem admissum*, &c. and a special entry is kept of it in a roll, and so perhaps is kept in *Colchester*.

Wray, *Chief Justice*. This is no error *in fait*, but in the record.

Gawdy, *Justice*. The guardian ought always to be admitted per Curiam. 2. *Mar. Dy.* 104.

3. Co. 53. 2. Sid. 173. 342. 2. Inst. 261. 3. Mod. 236. Hob. 5. Pigot, 63, 64. 2. Vern. 342. Prec. Ch. 376. 8. Mod. 25. 2. Peere Will. 129. 297. 3. Peere Will. 140. Str. 114. 304. 445. 708. 1076.

Case 48.

Appleton *against* Burr.

Easter Term, 31. *Eliz.* *Roll* 248.

Error assigned on a judgment in an action for an escape.

ERROR upon a judgment in an action upon the case in the common pleas. The plaintiff counts, that he had sued *T. B.* and had a process to arrest him directed to the defendant, being

Ante, 26. Post. 289. Cro. Jac. 242.

ſheriff of *Eſſex*; and thereupon he ſent his warrant to the bailiffs of the franchiſe of *S.* to take him; who arreſted him, and delivered him to his deputy; and he ſuffered him to go at large, and had not his body at the day of the return, *in amiſſionis debiti ſui periculum.*—FOSTER aſſigned divers errors.—Firſt, He doth not alledge he delivered to him within the county, and then the ſheriff had not cauſe to detain him.—Second, He doth not alledge he let him at large without ſureties, for he ought to take ſureties of him if offered.—Third, He alledges he had not his body at the day, and perhaps he appeared of himſelf, and then the plaintiff hath no prejudice.—Fourth, For that he ſaith, *in amiſſionis debiti periculum*, which is not material, if he loſeth it not indeed.—GODFREY argued *cont'*.—But THE COURT gave no opinion (*a*).

APPLETON *againſt* BURA.

(*a*) It was moved again, and the judgment was affirmed. Poſt. 289.

CASE 49.

Hawes *againſt* Coney.

Trinity Term, 28. *Eliz.* *Roll* 1010.

TRESPASS for breaking his cloſe in *Thurkell*. Upon not guilty pleaded, the jury found a ſpecial verdict.—*John Smith* had iſſue *Thomas Smith* and *Robert Smith*. *Thomas Smith* was ſeiſed of a houſe and ſeven acres of land in *Thurkell* for life, reverſion in fee to *Robert* his brother. The ſaid *Robert* was ſeiſed in poſſeſſion of forty acres of land in poſſeſſion, in *Norton* in the ſame county. *Robert* made his will, and deviſed all his free and copyhold land to his executors for performance of his will, and the will of *J. Smith* his father, in which were divers legacies given, "to have and to hold to them and every of them, and that they "ſhould take the profits of it for ten years to the uſe of his will, "and that afterwards his executors or one of them ſhould ſell the "land, and diſtribute the money in performance of the ſaid will," and dieth. *Thomas* the brother being tenant for life, dieth within half a year after him. The executors enter into the land in *Norton*, but not in *Thurkell*, and occupied them for ten years; and after enter into the land in *Thurkell*, and ſell all the land in *Thurkell* and *Norton*; whereupon the heir of *Robert* the deviſor enters into the land in *Thurkell*.—The queſtion was, If his entry were lawful?

What words in a will ſhall amount to an authority.

S. C. 1. Leon. 180. Skin. 631. 2. Vern. 461. 3. P. Wms. 56. 2. Burr. 982. Cowp. 313. 808. 1. Bro. Caſ. Ch. 135. 311.

COOPER argued for the defendant, that by the words and intention of the will, they had no authority to ſell the land in reverſion; for the words, that "they ſhall take the profits for ten years," ſhew his intent only for the land in poſſeſſion, of which profit may be taken.

COKE *contra*. The profits ſhall be intended ſuch profits as he may take of a reverſion; and is like the caſe 34. *Hen.* 6. *pl.* 6. A deviſe was of all his tenements in *manibus ſuis exiſtentibus*; the reverſion ſhall paſs; and cited the caſe 39. *Edw.* 3. *pl.* 27. for the expoſition of words in the king's grant.

GAWDY, *Juſtice*. The reverſion is not deviſed, for no profit of it.—But all the other Juſtices *contra*; for the intent of the deviſe was to perform the two wills, and to pay debts, &c. and perhaps the land in poſſeſſion was not ſufficient.—WRAY, *Chief Juſtice*, ſaid, the word "*all*" perſuaded him much that his intent was ſo; and the words "*to have and to hold*," and the words "*to take the profits*,"

HAWES *against* CONEY.

"*profits*," are of one ſenſe, for he cannot hold but by taking the profits; and here are two wills to be performed, and therefore the deviſe ſhall be taken in the moſt liberal manner for the performance of them. But if it had been found that the land in poſſeſſion was ſufficient to perform them, this might peradventure have altered the caſe.

CASE 49.

Dove *againſt* Williot.

A leaſe for years by parole made by the remainder-man of a copyhold in fee commences immediately, if the tenant for life join with him and ſurrender the eſtate to his uſe.
Poſt. 547.
Co Lit. 338.
3. Bac. Abr. 439.
4. Bac. Abr. 329.
1. Term Rep. 600.

TRESPASS, Upon ſpecial verdict the caſe was this: Tenant for life, the remainder in fee of a copyhold; he in the remainder maketh a leaſe by parole; tenant for life and he in the remainder join in a ſurrender to the uſe of him in the remainder in fee; the queſtion was, If this were a good leaſe, and ſhould take effect in the life of the tenant for life?—And it was held by GAWDY, CLENCH, and WRAY, that it ſhould, for the leaſe is good againſt him in the remainder; and by the ſurrender of the tenant for life to the uſe of him in the remainder, his eſtate is drowned in the fee, and as it were extinct, and cannot hinder the leaſe to have operation; and is all one as if he were dead, and being all in one hand, cannot have any privilege ſevered from the inheritance; as if he in the remainder grants a rent-charge, and after the tenant for life doth ſurrender, the rent ſhall commence *preſently*.—But GAWDY ſaid, if a leaſe be made for two years, and after the leſſor let the land by parole to another for four years, this is but a leaſe for two years, although the firſt leſſee ſurrenders, for he had no power to contract for the firſt two years at the beginning; but otherwiſe it is when the eſtate is determinable upon an uncertainty: *Smith v. Stapleton, Plowd.* 426.

CASE 50.

Knowles *againſt* Palmer.

A return to an *elegit*, that the ſheriff hath divided the land, but could not deliver it by reaſon of an extent, is no bar to a new execution.
Poſt. 310.
1. Roll. Abr. 905.
Cro. Jac. 338.
Gilb. Ex. 52.
See 3. Bl. Com. 419. directly contrary.
Hob. 58.
Ld. Raym. 718.
Dougl. 473.

THE caſe was moved by ATKINSON, That in debt after judgment, the party prayed an execution by *elegit*; which being granted, the ſheriff doth return, that he had divided the land by oath, &c. but he could not make execution, for the land was extended upon a former ſtatute; and thereupon the plaintiff prays a *capias ad ſatisfaciendum*, and had it. And thereupon ATKINSON prayed a *ſuperſedeas*, becauſe a *capias* is not to be awarded after an *elegit*, eſpecially if the ſheriff return he hath lands: but if the return were *nihil*, it were more doubtful; for when the plaintiff hath elected the higheſt execution, and the defendant hath land which may be delivered, he cannot reſort to a lower execution.—GAWDY, *Juſtice*. He may have execution by *capias*, for this is the higheſt execution which can be, for it concerneth the body; and the difference is, that after a *capias* he cannot have an *elegit*, nor other execution; but after an *elegit*, if he be not ſatisfied, he may have a *capias*; and ſo is the better opinion of the books. 17. *Edw.* 4. *pl.* 4. 21. *Hen.* 7. *pl.* 19. 31. *Ed.* "*Proceſs*" 52. 5. *Edw.* 4. *Br.* "*Execution*" 93. and the ſtatute which giveth the *elegit* doth not reſtrain the execution at the common law. The other Juſtices ſeemed to agree with him; but they would adviſe.—Afterwards *Knowles* being taken by *capias*, he prayed remedy upon it.—But all THE JUSTICES held it well awarded; and they could not help him, although his caſe in equity, as it was opened, deſerved favour.

Weeks *against* Holmes et Uxorem.

CASE 51.

DEBT against them for certain barrels of beer sold to the *feme*, *dum sola fuit*. They both waged their law; and this term both *baron* and *feme* did swear, according to the form of the oath.

QUOD NOTA. The *baron* did swear for the debt of the *feme*.

Wager of law. *Baron* swears for the debt of the *feme*.

Co. Lit. 172. b. and 295.

Parkins *against* Hinde.

Trinity Term, 30. *Eliz. Roll* 418.

CASE 52.

PROHIBITION for suing for tithes of land in *Babington*. The case was, The parson of *Babington* 29. *Hen.* 8. did lease all his glebe land to *Mills* for ninety-nine years, rendering thirteen shillings and fourpence rent for all *exactions and demands*; and now his successor sued for tithes of the land, being the glebe land: and upon it the plaintiff sued a prohibition.

Glebe lands shall pay tithes in the hands of the parson's lessee, although the lease expresses that the rent reserved is for "*all* "*exactions and* "*demands*."

Post. 479. 578.

GODFREY moved, that the prohibition lieth, because the land was let rendering rent, and it is for all exactions and demands; and by that he bars himself and successors of all tithes.

But all THE JUSTICES *contra*. For WRAY said, the parson shall have tithes against his lessee, and the words here shall be no discharge; for these tithes arise and accrue after, and are not things issuing out of the land, but collateral, and due *jure divino*; and therefore cannot be discharged but by special words. But if the words had been, as well for tithes growing and arising upon the lands as for other demands, then peradventure it had been a good discharge. But as the case is, it cannot be intended by any words, that he reserved the rent for tithes. And so GAWDY, *Justice*, did conceive, especially as the case here is, the lease being of twenty-four acres of land, and only thirteen shillings and fourpence reserved.—And afterwards, the same day, they granted a consultation: but they said, that the words shall discharge the lessee of all rents and services; but not of suit at court, or such things as are not then in demand. 11. *Co.* 13.

2. Roll. Abr. 57. Owen, 39. Moor, 47. 11. Co. 13. Dyer, 43. *in marg.* 1. Leon. 300. Owen, 39. 3. Burr. 1378.

Mannings *against* Townsend.

Trinity Term, 31. *Eliz. Roll* 136.

CASE 53.

DEBT upon an obligation, dated 1st *May*, 27. *Eliz.* The defendant pleaded, that he was bound in this obligation *simul cum Rich. Gotts*, to whom the plaintiff had released all actions and demands the said first of *May*. The plaintiff by replication shewed, that after the obligation sealed by *Gotts*, he released to him; and afterward, *viz.* the same day, the defendant sealed the bond, ABSQUE HOC *quòd tenetur simul cum Gotts*; and upon this it was demurred in law.—And it was clearly held, that this release doth not discharge the defendant; but they held the traverse to be ill because *Gotts* was bound with the defendant. But because the defendant had not taken advantage of it, to shew it upon the demurrer, and had confessed the matter *in fait* alledged by the plaintiff, it was adjudged, that the plaintiff shall recover, if nothing be shewn to the contrary within two days.

A release to one of two obligors shall not discharge the other, if he sealed the bond after the release was given.

2. Roll. Abr. 412. Cro. Jac. 372. Co. Lit. 232. Hob. 66. Noy, 62. 5. Co. 97.

Case 54.

Bugberd *against* Dominam Reginam.

Hilary Term, 31. Eliz. Roll 4, or 48.

The king shall not recover damages in a *quare impedit*; for he is not within the statute of Westminster.

2. Inst. 362. 6. Co. 51. 1. Leon. 150.

ERROR of a judgment in a *quare impedit* for the queen, for the church of *Kettington* in *Essex*.—Error assigned, that the judgment is, That the queen shall present, and recover for the value of the church for half a year.

FENNER, *serjeant*. The queen is not by the common law to recover damages, nor any other person, and the statute of *West.* 2. c 5. giveth no damages but where the party is hindered of presentment; which the queen is not in this case, when she presenteth by her prerogative; as in this case, where she presenteth by reason of *lapse*. 14. *Edw.* 3. "*Quare Impedit*" 54. 3. *Hen.* 6. "*Damages*" 17. And he hath searched divers precedents, *viz. Pasch.* 7. *Hen.* 5. *Roll* 442. & 2. *Hen.* 6. *Roll* 404. 9. *Hen.* 6. *Roll* 316. where no damages are given; and the case of 7. *Eliz. Dyer*, 236. is but a *Curia advisare vult*. The statute cannot be intended to give damages but only to the true patron, and not to the queen, who claims only by prerogative.

GAWDY, *Justice*. The queen shall not recover double damages, for the queen cannot lose her presentment; but single damages is only for the *tort* in the presentment; and this the queen shall have, as any other person. The case of 13. *Edw.* 3. "*Quare Impedit*" 181. was near the time of the making the statute; and they best intended the meaning of the parliament; and although precedents now are otherwise, it may be that the king did not regard damages, or were never demanded.

WRAY, *Chief Justice, contra*. It is hard, that when one part of the statute will not serve for the queen, and she is out of it, that it shall be construed she shall have benefit of another part of the statute; and although the case of 13. *Edw.* 1. is so, yet divers books since that, in the time of *Edw.* 3. and *Hen.* 6. and since, are, that the king shall not have damages; and the books and precedents being so till 7. *Eliz.* it is fit to adjudge the case according to them.—CLENCH agreed.

(*a*) Post. 180.

Afterwards (*a*), *Trin.* 32. *Eliz.* WRAY said, he had conferred with ANDERSON, MANWOOD, PERIAM, and WALMSLEY; and all (except PERIAM) agreed, that no damages were to be given: and for that cause the judgment was reversed.

Michaelmas Term,

31. and 32. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Hugh Wyndham, *Eſq.* } *Juſtices.*
Thomas Walmſley, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Anneſly *againſt* Johnſon.

CASE 1.

REPLEVIN. After a ſecond deliverance, a return was awarded *Johnſon*, and *averia elongata* being returned, a *withernam* was awarded of the cattle of the plaintiff, and afterwards the plaintiff cometh and ſatisfieth the defendant his damages; and prayeth a writ of reſtitution of his cattle.—FLEETWOOD. Cattle taken in *withernam* are not repleviſable; for how then ſhall the party be ſatisfied for the meat of the cattle?—CURIA. They are not repleviſable without doubt; but upon ſatisfaction he ſhall have a writ of reſtitution of the cattle, and ſo is the courſe; which all the clerks did agree. And as to the food, he hath the occupation of the cattle, and it is reaſon he ſhould find them meat for it.—And the writ was granted. *Vide* 16. *Hen.* 6. *Return de Avers*, 2.

Cattle taken in *withernam* are not repleviſable; but on ſatisfaction made, the owner ſhall have a writ of reſtitution without paying for their keep.

Owen, 46. 3. Leon. 235. 4. Bac. Abr. 379. Ld. Raym. 719. 1. Salk. 248.

Goſtwick's Caſe.

CASE 2.

A LEASE was made for two years, upon condition, that they nor either of them ſhall alien any part of the land without aſſent of the leſſor. They make partition, and one alieneth his part. This is a forfeiture of the whole.

Forfeiture by alienation.

Ante, 35. 1. Wood. Con. 10. Cowp. 803. Dougl. 57. 184. 2. Term Rep. 425.

Anonymous.

CASE 3.

THE lord releaſeth and grants his ſeigniory to the huſband, who is ſeiſed of the tenancy in right of his wife, to him and his heirs. The huſband dieth, and his heir diſtrains for the rent upon the lands.—ANDERSON and THE COURT held, that it ſhall inure as a *grant*, which is moſt beneficial to the grantee; and it is agreeing with the intent of the deed, that the huſband and his heirs ſhall have it.

Deeds ſhall be conſtrued ſo as to effectuate the intention for which they were made.

Co. Lit. 299. a. Cowp. 600.

Anonymous.

CASE 4.

QUARE IMPEDIT. The queen having the advowſon of the vicarage of *D.* grants the vicarage to *J. S.* The queſtion was, If the advowſon paſſeth?—FENNER argued it ſhould paſs. PUCKERING *contra*.—And all THE JUSTICES held it ſhall not paſs. For by the queen's grant nothing ſhall paſs, but what ſhe intends to paſs; and the vicarage is another thing than the advowſon, and every thing muſt paſs by its proper name; and it ſhall not paſs in the caſe of a common perſon.

The *advowſon* ſhall not paſs by a grant of *the vicarage*.

Hob. 303. 243. 2. Wilf. 116. Cowp. 9.

CASE 5.

Anonymous.

Administration may be revoked. Poſt. 460.

NOTA. By ANDERSON and WALMSLEY. Adminiſtration committed may be revoked, notwithſtanding the ſtatute of 21. *Hen.* 8. c. 5. And ſo it has been often uſed. WYNDHAM and PERIAM doubted.

1. Lev. 155. 186. 1. Sid. 280. Allen, 36. 2. Brownl. 119. Fitz. 303. Style, 10. Latch. 68. Skin. 155. 3. Mod. 23. 90.

CASE 6.

Rookwood's Caſe.

Aſſumpſit will lie on a promiſe to pay an annuity in conſideration that lands are not charged with it.

ROOKWOOD having iſſue three ſons, had an intent to charge his land with four pounds *per annum* to each of his two youngeſt ſons for their lives; but the eldeſt ſon deſired him not to charge the land, and promiſed to pay to them duly the four pounds *per annum*; to which the two younger ſons, being preſent, agreed; and he promiſed to them to pay it. And for non-payment after the death of the father, they brought an *aſſumpſit*.—The WHOLE COURT held clearly, that it was well brought, and that it was a good conſideration; for otherwiſe his land had been charged with the rents.

CASE 7.

Hambledon *againſt* Hambledon.

A deviſe to three, and that each ſhall be the other's heir, is a joint-tenancy.

A DEVISE was to three, and that the ſurvivor ſhall be each other's heir.—It was adjudged, that they were all joint-tenants. And ſo is the meaning of the will.

S. C. 3. Leon. 262. Savil. 92. Owen, 25. 1. Leon. 166. 3. Com. Dig. 33. Powel on Dev. 420. 422.

CASE 8.

Criſp's Caſe.

Trinity Term, 31. Eliz. Roll 1636.

The next avoidance of a church muſt be granted by deed.

QUARE IMPEDIT. And declares of a grant of the next avoidance. The defendant demands oyer of the deed, and the plaintiff ſhewed a letter written to his father by the patron, in which he writ he had given him the next avoidance; and upon this it was demurred.—It was ruled clearly without argument againſt the plaintiff; for it was a mere mockery, and the grant cannot be without deed.

Plowd. 150. 1. Leon. 207. Co. Lit. 332. 10. Co. 63.

CASE 9.

Gillam's Caſe.

Bona ſua in an action by an executor, mean the goods of the teſtator.

EJECTIONE FIRMÆ. As executor for ejecting him out of his *ferme, et bona ſua ibidem cepit, &c.* And after verdict found for the plaintiff it was alledged, that *bona ſua, &c.* ſhall be intended his own goods, and not the teſtator's.—CURIA *contra.*

Ante 6. 1. Brown's Caſ. Ch. 127.

CASE 10.

Pemberton *againſt* Cony.

Debt lies againſt an executor *durante minore ætate*

Ante, 43.

1. Wood's Con. 128.

J. S. makes an infant of the age of four years his executor, and doth by his will appoint that *J. D.* during the nonage of the infant ſhall have the diſpoſition of his goods.—Debt ſhall be brought againſt *J. D.* during the infancy; for he is executor during that time.

George

George Ognell *againſt* Paſton.

CASE 1.

31. & 32. Eliz. In the Exchequer.

DEBT. The caſe was, *Francis Woodhouſe* was bound in a recognisance in chancery to *Ognell*, which being forfeited, *Ognell* ſueth two *ſcire facias*' againſt him, and both were returned *nihil*, and thereupon had judgment to recover his debt; and thereupon he ſueth out a *levari facias*, which was returned *nihil*; and thereupon he ſueth a *cap. ad ſatisfaciendum* directed to the defendant, ſheriff of *Norfolk*; the ſaid *Woodhouſe* being then in priſon for ſuſpicion of felony, and the defendant doth arreſt him upon it.

Ca ſa. lies after *ſcire facias* returned upon a recogniſance, and may be executed upon a priſoner committed for felony; and after judgment in debt againſt the ſheriff for his eſcape, the ſheriff cannot diſpute the validity of the writ, for tho' it were erroneous, it is not void.
Poſt. 138. 214. 271. 516. 576. 707. 776. 893.
Godb. 403.
2. Leon. 84.
Moor, 274.
8. Co. 142. a.
1. Roll. Abr. 897.
Yelv. 42.
Cro. Jac. 3.
3. Mod. 324.
Carth. 148.
5. Mod. 413.
Ld. Raym. 776.
4. Burr. 2034.

Woodhouſe was arraigned and found guilty; and afterwards being diſcharged of the felony. The defendant ſuffers him to go at large. *Ognell* brought debt upon the eſcape. The defendant pleads the conviction of felony. Upon this the plaintiff demurs.

Firſt queſtion. If a *capias ad ſatisfaciendum* lieth upon a recogniſance in chancery, a *ſcire facias* being returned upon it?

Second queſtion. Admitting a *capias* was not grantable, if it be void, or only erroneous, ſo as the party muſt avoid it by *audita querela*, or error?

Third queſtion. *Woodhouſe* being in priſon for felony, if the execution was well ſerved upon him?

This term it was argued by the BARONS; and as to the third point, they all reſolved, and the counſel of the other party did not much inforce the contrary, that execution was well ſerved upon him; for although his body was at the queen's pleaſure, yet he ſhall not take advantage of his own *tort* (no more ſhall the ſheriff), but he ſhall anſwer the action or execution of a common perſon.

And as to the firſt point, all THE BARONS were of opinion, that the proceſs was well awarded, and maintainable by the law; for it being a debt of record, it is not reaſon but his body ſhould be liable to execution upon it, as to a common obligation; and this *capias* is not by the ſtatute of *Weſt.* 2. *cap.* 45. or 25. *Edw.* 3. but by the courſe of the common law, and the courſe of the chancery, and precedents are uſual there after *ſcire facias*; and their courſes are to be maintained as of other courts.

Second queſtion. Admitting the *capias* lay not, yet it is not void, but erroneous. And this the ſheriff ſhall not diſpute, nor take advantage of it; for it was a good warrant to the ſheriff to take him, and falſe impriſonment lieth not againſt him. 9. *Edw.* 4. *pl.* 13. 21. *Edw.* 4. *pl.* 23. 36. *Hen.* 6. *pl.* 32. And it ſhall always be a good execution, until the party avoid it by error.—And by all their aſſent the plaintiff had judgment.

Hilary Term,

32. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*

Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Venard *againſt* Wotton.

Words imputing forgery, muſt import that it was of a puniſhable kind, if true, or they are not actionable.

1. Yelv. 146. 3. Buiſt. 265. 1. Hawk. P. C. 338. In 2. Str. 749. this caſe is denied to be law.—2. Ld. Raym. 1463.

ACTION for theſe words: "You have falſly forged your "father's hand, and thereby falſly have procured your "father's tenants to pay their rents to you, due to your "ſiſter." After verdict for the plaintiff, FULLER moved, that the words are not actionable, for it is not ſhewn what thing he forged, for which he is by any law puniſhable. And here it may be he counterfeited his father's hand to a letter, for which he is not puniſhable. 28. *Eliz. inter Brook et Doughty*, "You have "forged my *Lord of Leiceſter's* hand to ſuch a letter," adjudged not actionable.—And ſo was the opinion of THE COURT: and judgment for the defendant.

CASE 2.

Taylor *againſt* Vale.

Michaelmas Term, 31. & 32. *Eliz. Roll* 68.

If a man by indenture "*give* "*and grant*" a rent-charge, and the deed is enrolled purſuant to 27. Hen. 8. c. 16. it is a "*bargain and* "*ſale*," but it muſt be ſo pleaded.

8. Co. 93. b. Co. Lit. 309. 672. Dyer, 30. 2. Inſt. 672. 3. Leon. 16. Touch. 219.

REPLEVIN. The caſe was upon demurrer. *Vale* having a rent charge in fee by indenture, which was enrolled within ſix months, *giveth and granteth* it to *Hall* in fee, and there was no attornment.

NOTA. In truth the caſe was, that he for a certain ſum of money giveth, granteth, and felleth the rent, &c. But it was pleaded only, that he by indenture *dedit et conceſſit*

And it was ruled without any argument, that the rent without attornment (*a*) paſſeth not, being only by way of grant, and not of bargain or ſale; although the deed was enrolled.—But WRAY ſaid, that if by indenture, in conſideration of a certain ſum of money, *dedit et conceſſit* and the deed is enrolled, this ſhall paſs the rent without attornment, though there be no words of bargain and ſale.—And the plaintiff had judgment.

7. Co. 40. 1. Leon. 25. Yelv. 213. 3. Lev. 16. 1. Wood's Con. 239. 652. Shepb. Gilb. Uſes, 88. 287.

(*a*) See 4. & 5. Ann. c. 16. by which the neceſſity of attornment is taken away. —Vide Dougl. 283. 1. Term Rep. 384.

Willis

Willis *against* Jermin.

CASE 3.

Hilary Term, 31. *Eliz. Roll* 674.

EJECTIONE FIRMÆ. It was found by verdict, that the dean and chapter of *Exeter* let the land to *Harvy* for years, rendering rent, payable at their chapter-house in *Exon*, and for default of payment the leafe to be void. *Harvy* affigned his eftate to the defendant; the rent was arrear, and not paid, being demanded at their chapter-houfe. The dean and chapter, by the name of the dean and chapter of *St. Mary* DE *Exon* (whereas they were incorporated by the name of *St. Mary* IN *Exon*) make an indenture of leafe for twenty-one years to the plaintiff of the land, and in their chapter-houfe put their feal to it, and make a letter of attorney to *J. S.* to enter and make delivery of this deed upon the land, which he did accordingly; and, If this be a good leafe? they pray the opinion of THE COURT.—HARRIS, *ferjeant*, prayed judgment for the defendant.—FIRST, The leafe of the land is void by *mifnomer* of the corporation. *Sed non allocatur*; for it is no material variance; and fo it hath been ruled.—SECOND CAUSE. The leafe was not good, becaufe the dean and chapter let it in their chapter-houfe, by fetting their feal to it; which being a perfecting the deed of the corporation, there can be no other delivery. Then the firft leffee continuing in poffeffion, and they out of poffeffion, the leafe was void; and the delivery after by the attorney, it having a former delivery, is void. *Sed non allocatur*, for there is no other means for a corporation to make a leafe but this. And GAWDY faid, it is plain that it is not the leafe or deed of the corporation until delivery, as of another perfon.—THIRDLY, The firft leafe ceafeth not till *entry*, and fo cannot make a new leafe. —WRAY. The firft leafe doth clearly ceafe without entry. GAWDY doubted.—FOURTHLY, The leafe is not good, for the attorney hath not executed his warrant according to his authority; for it was, that he fhould enter and claim it to the ufe of the corporation, and then deliver the leafe. And the jury found that he delivered it upon the land, but found not that he entered and claimed, &c. *Sed non allocatur*; for in a fpecial verdict, the circumftances of every thing need not fo ftrictly be found, as it is to be pleaded; and it being found, that by virtue of the warrant he delivered it upon the land, it fhall be intended he purfued it duly. 9. Co. 51. —FIFTHLY, It is found that they demanded the rent at the chapter-houfe, whereas the demand fhould be upon the land. *Sed non allocatur*, for the demand at the place where it is payable is fufficient.—And the plaintiff had judgment.

If a dean and chapter feal a leafe, it is their deed immediately; but if at the fame time they make a letter of attorney to deliver it, this is not their deed till the delivery. Poft. 221. 1 Roll. Ab. 830. 2. Roll. Ab. 23. 42. 428. Co. Lit 36. 3. Co. 64. 11. Co. 20. 1. Wood Con. 232. 3. Bac. Abr. 336.

If a verdict find that a man virtute warranti made a leafe, it fhall be intended that he purfued his authority. Poft. 181. 188. 669. Co. Lit. 48. 5. Com. Dig. 370.

Demand of rent where it is payable is fufficient. Co. Lit. 202. a. Poft. 415.

Smith *against* Hillier and Clerke.

CASE 4.

Trinity Term, 31. *Eliz. Roll* 308.

FALSE IMPRISONMENT in *Middlefex*. The defendant pleads that *Lynn* is an ancient village, and that in it *ufitatum eft a tempore quo, &c.* to chufe a mayor every year, and that the mayor for all the time, &c. was *cuftos gaolæ* there; and fheweth, that a plaint was entered in the court there againft the plaintiff, for which he was committed by the mayor to the gaol there, ABSQUE HOC that they are guilty of the imprifonment in *Middlefex*: upon which the plaintiff demurs.

Pleading.

SMITH *against* HILLIER and CLERKE.

TANFIELD *for the plaintiff*. The bar is not good. First, Because the prescription is, that for all the time, &c. the mayors had been keepers of the gaol, which was no good pleading of the custom; for he ought to say, *usitatum est, &c.*—Secondly, The mayor cannot commit one to himself; for there ought to be one to commit, and another to receive; and not to be both one person. —Thirdly, he doth not prescribe to have a gaol there, nor sheweth not there was a gaol there; and it may be, that he may make his gaol where he pleaseth, and then the plea should be, *commissus custodiæ majoris*, and not to the gaol; or the prescription should be, that the mayor, &c. was *custos* of all prisoners, and not *custos gaolæ*.—Fourthly, He traverseth ABSQUE HOC that he was guilty in *Middlesex*, which is not good; for he cannot traverse the place, but generally, for the defendant cannot straiten the plaintiff to a place. —Fifthly, The defendant justifying between the 28th day of *September* and the 14th of *October*, at which day he was removed by *habeas corpus*; and shew, that the 29th day of *September Hellier* was chosen mayor, but do not answer to the time of the day of 29th *September*, before which he was chosen mayor; for it may be, he imprisoned him the same day, before he was chosen mayor, which is not answered.

COKE *for the defendant*. The bar is good, notwithstanding the exceptions.—First, It is once alledged, that *usitatum est* to chuse a mayor, &c. then *usitatum est* shall be referred to every part of the prescription, and need not reiterate it to every part.—Secondly, The course of all corporations is, that the mayor, which is the judge, is gaoler also: so the sheriffs of *London*, they have a court in the *Guildhall*, and are officers and gaolers to it.—Thirdly, He need not prescribe in the gaol; for it is incident to a court to have a gaol, as a court of piepowders to a fair; also a gaol is not in a place certain, but goeth with the person of the gaoler.—To the fourth, The traverse is good; for if he traverse generally, the justification in a place certain shall be waived, which is material as this case is, and shall not be enforced to it, where it is local; and in *Covet's Case*, it was adjudged in false imprisonment, he justifies as constable in *Sussex*, ABSQUE HOC that he is guilty in *Middlesex*; and awarded good. So in *Lovel's Case* in trespass, for taking his horse in *Cambridge*, he justifies for damage-feasant in *Essex*, ABSQUE HOC that he was guilty in *Cambridge*; and it was good by award.—To the fifth, upon which it was much relied, he answered, that it shall be intended a justification for the whole day, for there shall be no division of a day. And if he imprisoned him before he was mayor, the plaintiff must shew it; for *primâ facie*, it shall be intended to go to the whole day. 15. *Edw.* 4. *pl.* 23. 9. *Edw.* 4.

And of the same opinion was THE COURT *in omnibus*: and it was adjudged for the defendants.

Ante 76.

Co. Lit. 282. b. Post. 375.

Co. Lit. 282. b. Post. 174.

Co. 1. 106. b.

CASE 5.

Kimersly *against* Cooper.

Trinity Term, 31. *Eliz. Roll* 768.

In words imputing perjury in an oath taken before magistrates, the plaintiff must shew they had authority to administer it;

ACTION FOR WORDS. The plaintiff declares, that whereas by the custom of *London* the mayor, recorder, and aldermen of *London*, being justices of the peace, had used to take the depositions and examinations of any person produced before them *in perpetuam rei memoriam*, and to keep the said depositions upon record

and though only inducement, yet being what intitles the plaintiff to his action, it may be traversed, if no law wager is allowed.—1. Roll. Abr. 563. 5. Com. Dig. 116. Dougl. 156. 1. Term Rep. 69.

KIMBERLY *againſt* COOPER.

in the court of the *Guildhall*, to be given in evidence to a jury for the better knowledge of the truth between any perſons; and that whereas he was examined and ſworn before *Sir George Bond*, mayor of *London*, being then and there a juſtice of peace, as a witneſs on the behalf of *Ed. Sta.* and made ſuch oath, &c. the defendant ſaid that he had falſly ſworn in the ſaid oath, *innuendo* the oath there taken in form aforeſaid, &c. to his damages, &c. The defendant pleaded, that the plaintiff was not ſworn before the ſaid *George Bond modo et formâ, prout, &c.*

1. Hawk. 319.

Upon this it was demurred in law.—Firſt, The traverſe cannot be taken; for the alledging of the oath is but conveyance to the action, and ſo is not traverſable; and if he never took ſuch oath, yet it is a great ſlander.—Second, This plea amounts to a general iſſue, and ſo is not good.

HARRIS *of Lincoln's Inn contra.* That the declaration is not good; for the force of it is, that the mayor had uſed to take the oath, &c. And if he had not authority, it is no more than if the plaintiff had taken a voluntary oath; in which for ſaying he is forſworn, is not actionable. And the cuſtom to warrant him to take the oath is not well alledged; for he ought to alledge, that the city is an ancient city; for otherwiſe he cannot preſcribe in it (*a*). 21. *Edw.* 4. *pl.* 54. 12. *Edw.* 4. *pl.* 8. 22. *Hen.* 6. "*Preſcription*" 47. And the traverſe is good, for it is not the conveyance, but the principal ſubſtance of the action, and without it the action is not maintainable, and ſo is traverſable. 34. *Hen.* 6. *pl.* 22. 13. *Edw.* 4. *pl.* 4. 26. *Hen.* 8. *Bro.* "*Action ſur Caſe*" 103. 14. *Hen.* 4. *pl.* 30.

(*a*) Strange, 1187. 1. Wilſ. 8. 3. Atk. 44.

GAWDY. Where the conveyance to the action is that which doth entitle the plaintiff to the action, it may well be traverſed, if the defendant cannot wage his law, otherwiſe where he may wage his law. 8. *Hen.* 6. *pl.* 5. 22, *Edw.* 4. *pl.* 29. 7. *Edw.* 3. *pl.* 54. 31. *Hen.* 6. *pl.* 10. 26. *Hen.* 8. *Bro.* "*Traverſe.*" 5. *Hen.* 7. *pl.* 3. But principally for the firſt fault, that he alledgeth not that it is an ancient city, the declaration is not good.—And of the ſame opinion were THE OTHER JUSTICES, that it is a thing traverſable, for the action is grounded upon it: and it was then adjudged for the defendant, without further argument.

Poſt. 201.

Alexander *againſt* Dyer.

CASE 6.

Trinity Term, 31. Eliz. Roll 901.

DEBT for rent reſerved upon a leaſe for years. And declares, that whereas he let the land to the defendant for twenty-one years from the feaſt of *St. Michael* next enſuing, rendering rent, and that the defendant had entered the 29th day of *September*, and had occupied for one year, &c. The defendant pleaded *nihil debet*; and after verdict againſt him, it was alledged in arreſt of judgment, that it appeareth in the declaration, that he had entered upon *Michaelmas-day*, which is a day before his title began, and ſo is a diſſeiſin, and no rent due.—GAWDY. It is clear he is a diſſeiſor by his entry, and the accruing of his term ſhall not alter his eſtate. 7. *Edw.* 6. *Dyer*, 89. Yet debt lieth for *privity* of contract. 24. *Hen.* 8. *Dyer, Ruſhden's Caſe.*—And ſo was the opinion of THE OTHER JUSTICES; and the plaintiff had judgment.

Debt lies for rent upon a leaſe, tho' the defendant entered before his title began. Poſt. 906. 1. Roll. Abr. 605. 2. Roll. Ab. 420. 2. Leon. 99. 3. Co. 23. b. 8. Mod. 54. 3. Bac. Abr. 104. 447. 1. Strange, 550.

Pod

CASE 7.

Dod *againſt* Coke.

In treſpaſs, a verdict may be good, tho' it varies from the iſſue.
Ante, 143. 157. Poſt. 799. 866.
2. Roll. Abr. 703.
Cro. Jac. 134. 662.

TRESPASS for breaking his cloſe, called *Sheeps-courſe*, in *High-field*. Upon not guilty, the jury found, that the place containeth divers acres; the plaintiff is ſeiſed of one acre in it, in which the defendant had entered; and that the defendant is ſeiſed of a great part of the ſaid place, and the *Earl of Suſſex* of another great part of it.—Upon motion, THE COURT held the action well brought; for although the plaintiff counts of the breaking of his cloſe, called *Sheeps-courſe*, in *High-field*, yet he may aſſign his treſpaſs in which place he pleaſeth: ſo the verdict is found for the plaintiff; and it was adjudged for him.

CASE 8.

Penſon *againſt* Hickbed,

Vide Ante, page 155.

Buying bills of debt is not maintenance.

THE caſe was now moved again, and two cauſes were aſſigned why the conſideration was not good.—Firſt, It is not alledged for what the money contained in the bills was due, nor to whom; and it may be they were bills made to the defendant himſelf, and due to him, and ſo no conſideration.—Secondly, This buying of bills of debt is maintenance, and ſo no conſideration.—For the firſt, THE JUSTICES held the conſideration is not well alledged for the cauſes aforeſaid. But for the ſecond, they held it is not maintenance, for it is uſual amongſt merchants to make exchange of money for bills of debt, *et è contra*. And GAWDY ſaid, it is not maintenance to aſſign a debt with a letter of attorney to ſue for it, except it be aſſigned to be recovered, and the party to have part of it.—And the judgment was reverſed.

See 9. & 10. Will. 3. c. 17. and 3. & 4. Ann. c. 9.

CASE 9.

Lord Stafford *againſt* Thynne.

A *capias pro fine* lies againſt a peer for diſſeiſin; and an aſſiſe "*de tenemento*," without ſaying "*de libero*," is ſufficient.
Ante, 158. Poſt. 503.
1. Roll. Abr. 220.
6. Co. 54. a.
2. Inſt. 236.
Hob. 61. 2. Hale, 199. 2. Hawk. 228. 4. Bac. Abr. 232.

ERROR of a judgment in an aſſiſe.—Firſt error, That the demandant counts of a *diſſeiſin de tenemento*, but ſaith not *de libero tenemento*.—Yet it was held good, for ſo much is implied.

Second, The judgment is *ideo capiatur*, and *capias pro fine* lieth not againſt a baron of parliament. 11. *Hen.* 4. *pl.* 15. 27. *Hen.* 8. *pl.* 22. 29. *Edw.* 3. *pl.* 39. 14. *Eliz. Dyer*, 315. But it was held by THE COURT to be good; for it is upon a diſſeiſin found, upon which a fine is given by the ſtatute; in which no perſon being exempt, it ſhall bind a nobleman as any other; and where a fine is due, a *capias pro fine* (*a*) is to be awarded; and for a contempt a *capias* lieth againſt a nobleman, and this fine is for the contempt to the law; ſo is 1. *Hen.* 5.—And the judgment was affirmed.

(*a*) This writ is aboliſhed by 4. & 5. Will 3. c. 12.

CASE 10.

Lane *againſt* Milward.

Trinity Term, 31. *Eliz. Roll* 490.

Amendment.
Ante, 79. Poſt. 543. 609.
Co. 8. 159. a.

ERROR upon a judgment in *Reading*, upon an *aſſumpſit*.—Firſt error, That the *venire facias* was 24. *jurator'* where it ſhould be 12. *jurat*. And this at firſt was held error, but after divers ancient

precedents

precedents were ſhewn, where ſuch *venire facias* were awarded, it was allowed to be good; for they would not reverſe ſo many precedents.—Second, The action was againſt *William Milward*, and the judgment was againſt *prædict.' Thomas Milward*. But THE COURT held it was but a miſpriſion of the clerk, and might be amended in affirmance of the judgment.—And the judgment was affirmed.

LANE *againſt* MILWARD.

Proud *againſt* Hawes.

CASE 11.

ACTION FOR WORDS: "That the plaintiff was *a com-* "*mon barretor.*"—After verdict, it was alledged in arreſt of judgment by EGERTON, *Solicitor*, that the words were not actionable. And ſo it ſeemed to THE COURT: and the judgment was ſtaid.

Words not actionable.

Cro. Car. 192. Hob. 140. 4. Bac. Abr. 452.

Ryle's Caſe.

CASE 12.

ACTION for theſe words: "He is a couzening knave; for he "hath ſold me a chain of copper for a chain of gold; and he "is a couzening knave upon record."—ATKINSON moved, that the words are actionable, and vouched *Bedford's Caſe*, for ſaying, "Thou art a couzening knave, for thou ſoldeſt a ſaphir for a "diadem;" and the action was maintainable.—But WRAY and GAWDY conceived the words are not actionable, except it had been alledged, that he was a goldſmith, and got his living by ſelling of chains and ſuch wares; then peradventure the action would lie, but not here.

Words not actionable.

Ante, 95.

Johnſon *againſt* Tucke.

CASE 13.

Michaelmas Term, 31. & 32. *Eliz. Roll*

ASSUMPSIT. Which was ſuppoſed to be in the pariſh of *St. Mary le Bow* IN *London*. The defendant pleads to part *non aſſumpſit*, and to the other part a releaſe in the pariſh of *St. Magnus, London*; and iſſues were joined upon both, and one *venire facias* awarded to try both iſſues: and this was *de vicenetede Bow*, and found for the plaintiff.—EGERTON, *Solicitor*, moved in arreſt of judgment, that it was a miſ-trial, for the *venire* ought to be of both places: for it was agreed, that the plaintiff might have, if he pleaſed, ſeveral *venires*; and might have at his election but one *venire facias*; and he relied upon 27. *Hen.* 6. *pl.* 6.—But it was moved, that it was a good trial for the iſſue which was at *Bow*, and a diſcontinuance for the other. 11. *Hen.* 7. *pl.* 5.—But the opinion of THE COURT was, that inaſmuch as the *venire facias* was awarded for trial of both iſſues, this is a miſ-trial in all, and cannot be good for one. But in 11. *Hen.* 7. *pl.* 5. the queſtion did ariſe, for that it did not appear that the *venire facias* was awarded to try both the iſſues, and judgment was ſtaid. And they ſaid he might take a *venire facias de novo* if he would.

It will be a miſ-trial if only one *venire* is awarded, where two iſſues are joined in different pariſhes.—*Sed vide poſt. note* (a), *page* 260.

Ante, 114.

Ward *againſt* Thorne.

CASE 14.

ACTION FOR WORDS. For calling him "rebellious and "traitorous knave."—After verdict for the plaintiff, it was moved in arreſt of judgment, that the action did not lie; for rebellious

Words actionable.

WARD *against* THURNE.

rebellious may be upon a proclamation of rebellion out of chancery, or other courts: and when traitorous and rebellious are coupled together, they are of the same sense.—CURIA. For the words "rebellious knave," action lieth not; but "traitorous" being joined with it, action lieth.—The plaintiff had judgment.

CASE 15.

Trofs *against* Michell.

The *garnishee* may plead "*nil* "*debet*," without saying he has "*no goods*;" and judgment cannot be for costs, but it must discharge the *garnishee*. Post. 184.

S.C. 1. Leon. 321. 22. Edw. 4. 30. b. Jones, 406. 1. Com. Dig. 425.

ERROR of a judgment in *Exeter* against the plaintiff upon a foreign attachment; where a suit being by *Michell* against *Hore*, the said *Hore* was returned *nihil*. And it was surmised, that the said *Trofs* had certain money in his hands due to *Hore*; whereupon, according to the custom there, this money was attached in the hands of *Trofs*. *Trofs* came and pleaded *nihil debet* to *Hore*. And upon this *Michell* doth demur; and adjudged for him, because he ought to have pleaded that he oweth nothing to *Hore*, nor had any money in his hands due to *Hore*. And upon this *Trofs* brought a writ of error.—First error. Because it is a good plea, and the plaintiff was to be barred, and not to recover; and so is the common pleading in *London*: for if it be no debt, it is not attachable. But it was answered, that it is no plea; for he may have money in his hands which is attachable, and yet no debt; as if he hath money to keep, or if he find the money of *Hore*, or otherwise: and therefore he ought to answer to every intent, and not to one intent only. But GAWDY said, it is good to a common intent, and so is the custom of *London*.—Secondly, Because *Michell* had judgment to recover costs against *Trofs*, which are not recoverable upon a foreign attachment.—Thirdly, Because no judgment was given, that *Trofs* shall be discharged against *Hore*.—And the judgment was reversed, principally for the first error.

CASE 16.

Shelbery *against* Buffard.

Errors in a judgment on a writ of right. Ante, 158.

ERROR of a judgment upon a recovery against *Bird* in *Colchester*, in a writ of right, in which the plaintiff was vouched, and came in and voucheth the common vouchee, and loseth by default.—FIRST, The writ of right was directed "*balli-* "*vis villæ suæ de Col.*" whereas it should be "*ballivis suis, &c.*" for they are the queen's bailiffs.—SECONDLY, The declaration was made before the appearance of the defendant by attorney, or in person.—THIRDLY, *Shelbery* the vouchee appearing by guardian, the entry was, "he appeared by guardian," but saith not, "*ad hoc per Curiam admissum.*"—FOURTHLY, The judgment was general against the vouchee, and not for the land only within the jurisdiction.—FIFTHLY, The demand is, "*de medietate duor'* "*mesuagior'*, and the judgment is, "*quòd recuperet tenement. præ-* "*dict.*" whereas it should be, "*medietatem tenement. prædict.*"—SIXTHLY, Because no judgment was given for *Shelbery* the vouchee against the second vouchee.—COKE. The judgment is well given, and there is no error but the last; and he said the record was otherwise, that judgment was given against the second vouchee.

A writ of right cannot be maintained without shewing an actual *seisin* by taking the *esplees*. Daly v. King, C. B. East. 28. Geo. 3.

But

But he moved, that the writ of error was not well brought, for it varieth from the principal record; for in that the plaintiff is named *Shelbury*; and here the writ is brought by the name of *Shelbery*, ſo *e* for *u*: and in *Trin.* 25. *Eliz.* a recovery was againſt one by the name of *Bird*, and he brought a writ of error by the name of *Burd*; and for this variance the writ did abate. 12. *Aſſize*, 2. 26. *Aſſize*, 31. Another variance: That the record was of lands in *Colcheſter*, and the writ of error ſuppoſeth the land in *Colceſter*; and the writ being merely founded upon the record, for theſe variances he prayed it might abate.—But notwithſtanding theſe exceptions the judgment was reverſed.

SHELBERY *againſt* BUSSARD.

A variance in ſpelling where the words have the very ſame ſound is not material. Poſt. 198.

25. Edw. 3. 43. 1. Roll. Ab. 797.

2. Roll. Ab. 329. 8. Mod. 31. 2. Hawk. 422. Cowp. 229. Dougl. 194. 402.

Porry *againſt* Allen.

CASE 1.

Hilary Term, 32. *Eliz.* *In the Common Pleas.*
Trinity Term, 30. *Eliz.* *Roll* 611.

DEBT upon a leaſe for years. It was found by ſpecial verdict, that one *Ball* being leſſee of theſe lands for forty years, let them to *Gibſon* for thirty years; and he let them to *Porry* the plaintiff for nineteen years, rendering 10l. rent: and afterwards articles of agreement were made between *Ball* and *Gibſon*, that *Porry* ſhould have and hold theſe lands and other lands for three years, rendering a greater rent; to which articles *Porry* doth agree at another time and place, and occupieth the land accordingly; and after let theſe lands to the defendant for ſeventeen years, rendering rent. The three years expired, afterwards *Gibſon* grants his term to *Cornwallis*, who enters in 29. *Eliz.* And for rent behind, after his entry, the action was brought: and it was argued by HAMMOND of the one part, and HARRIS of the other.—Firſt queſtion, If this was a ſurrender by this agreement? Second, If a ſurrender may be, as this caſe is, by one termor to another, out of which his term is derived, becauſe one term cannot drown in another?—But all THE JUSTICES held clearly, that this cannot be a ſurrender; for the words and the acts between ſtrangers can make no ſurrender. And this agreement that *Porry* ſhall hold the land is a void agreement for a ſtranger to take benefit by it. And ANDERSON held clearly, that an agreement or covenant made between *J. S.* and *J. N.* that *J. D.* ſhall have ſuch land for years; this being made between ſtrangers cannot amount to a leaſe. So if *J. S.* covenants with *J. D.* that his executors ſhall have ſuch land for twenty-one years, this cannot amount to a leaſe; for they are in this degree as ſtrangers: and for this point principally, they all held it can be no ſurrender.—And for the other point, they alſo held, that this can be no ſurrender; for when leſſee for twenty years maketh a leaſe for ten years, the ſecond leſſee cannot ſurrender to the firſt leſſee, for ten years cannot be drowned in twenty. —And it was adjudged for the plaintiff.

An agreement between the leſſor and a ſtranger that the leſſee ſhall have a new leaſe, is no ſurrender. Poſt. 302. 488.

2. Roll. Abr. 497. 1. Co. 155. a. 1. Leon. 177. 305. Co. Lit. 273. 3. Bac. Ab. 420. 458.

Brookſbie's

CASE 2.

Brookſbie's Caſe.

If the next avoidance of a church be granted to two, one of them may releaſe to the other before the avoidance happens, Poſt. 600.

QUARE IMPEDIT. Upon the declaration it appeared, That a grant of the next avoidance was made to him and one *H. B.* and after the church became void, *H.* releaſed to the plaintiff all his eſtate, right, and title; and he being diſturbed, brought a *quare impedit* in his own name only. After verdict, this matter was alledged in arreſt of judgment, that the releaſe after avoidance was void; for it is a thing in action, which cannot be granted or releaſed from one to another; but a releaſe before avoidance is good.—Being argued by HARRIS and FENNER, *ſerjeants*, on the defendant's part, and by DREW and BEAUMONT on the plaintiff's part, it was adjudged againſt the plaintiff, that the releaſe was void; for after the avoidance it is merely a thing in action and ſo annexed to the perſon, that it cannot be granted or releaſed.—And they commanded the roll of *Stafford's Caſe* to be ſearched; but no judgment was there entered. *Vide Dyer*, 282.

Moor, 467. Dyer, 262. 244. 1. Leon. 167. 1. And. 15. 223. Godb. 112. Owen, 131. 2 Bac. Abr. 657. 10. Co. 48. 2. Wilſ. 196.

CASE 3.

Walter Moile's Caſe.

A new writ allowed to executors in *quare impedit* by *journies accompt*.

COOPER moved that *Walter Moile* had brought a *quare impedit*, and died pending the writ; and he prayed to have another writ by *journies accompt* for his executors; for he ſaid he could not have it but by the allowance of the Court.—And THE COURT granted it; but ſaid, "Regard well if it lieth in this caſe or not; and in "what form the writ ſhall be."

6. Co. 10. b. 1. Vent. 235. Ld. Raym. 432.

CASE 4.

Anonymous.

A *fi. fa.* may be executed on goods *bonâ fide* ſold after the *award* of the writ.

COOPER deſired the opinion of the Court, that if a *fieri facias* be directed to make execution of goods, and after the *teſte* of the writ, and before the ſheriff executes it, the party ſells the goods *bonâ fide*, if they can now be taken in execution.—THE COURT held they might; for by the award of execution, the goods were bound, ſo that they may be taken in execution, into whoſe hands ſoever they come.—And WALMSLEY ſaid, ſo it was ruled in a caſe at *Hertford* term, wherein he was of counſel.

Poſt. 181. 440. 8. Co. 171. Cro. Jac. 451. Sid. 271. Carth. 419. Gilb. Ex. 13. 6. Mod. 225. 1. Salk. 320. 2. Stra. 751. 1. Bac. Abr 262. 1. Term Rep. 729.—By 29. Car. 2. c. 3. no writ of execution ſhall bind the property but from the time of its delivery to the ſheriff.

CASE 5.

Bullock *againſt* Sir John Smith.

A ſpecial plea amounting to the general iſſue is bad.

ACTION SUR TROVER of ſix oxen in *London*, and there converted. The defendant ſaid, he ſeized them in the manor of *D.* in *Eſſex*, as goods waived there; and ſo juſtifieth, ABSQUE HOC that he was guilty in *London*.—PER CURIAM. It is no plea; for it amounts but to the general iſſue, containing no matter local to make the place material.

Co. 10. 91. a. c. Ant. 168. Poſt. 484. 504.

Eaſter

Eaſter Term,

32. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt.* *Attorney General.*
Sir Thomas Egerton, *Knt.* *Solicitor General.*

Marſh *againſt* Aſtry.

CASE 1.

ACTION UPON THE CASE. "Whereas he had brought a "writ of entry againſt *Champion*, for certain lands in *Eaſt-* "*Barnet*, directed to the ſheriff of *Hertford*, returnable "*Octabis Martini*, and delivered it to the defendant, being under- "ſheriff of the ſaid county, to be executed *in formâ juris*, and gave "him 2s. for executing it; and that ſuch a day he had cauſed the "ſaid *Champion* to be ſummoned according to the writ; yet *falsò &* "*malitiosè* intending to deceive the plaintiff, and to hinder him of "his recovery of the ſaid lands, did not return the ſaid writ of ſum- "mons at the ſaid day of *Octabis Martini*; PER QUOD he *retardatus* "*fuit* of his recovery of the ſaid lands, to his damages of 1000l." Upon not guilty pleaded, it was found for the plaintiff.—COKE moved in arreſt of judgment, that this action being for *non-feaſans*, *i. e.* for not returning the writ, the action lieth not againſt the under-ſheriff, but ought to be brought againſt the ſheriff himſelf; for he is reſponſible for all things concerning the office; and he relied upon 19. *Hen.* 6. *pl.* 29. 41. *Aſſ.* 12. 21. *Edw.* 3. *pl.* 46.—Secondly, It was not averred that he was under-ſheriff, and continued in the office at the ſaid day of *Octabis Martini*, for otherwiſe the action lieth not againſt him.

If a writ be delivered to the under-ſheriff to make a ſummons, and he deceitfully neglects to return the writ, an action will lie againſt *him*; for perhaps the ſheriff had not notice of it, and *he* ſhall be intended at the time of the return. Poſt. 178.

1. Roll. Abr. 93, 94. 2. Rol. Abr. 607. 1. Leon. 146. See 7. Edw. 6. c. 1. 4. Bac. Abr. 442, 443. in notis. Ld. Ray. 655. 3. Wilſ. 314. 2. Bl. Rep. 833. Dougl. 40. 43. 671. Cowper, 403.

Sed non allocantur. For firſt, The under-ſheriff for a *tort* done by himſelf may be puniſhed. And here it is alledged, that he *falsò & malitiosè* intending to delay the plaintiff of the execution of his writ, did not return it: ſo it is as an embezzling of the writ, for which he is puniſhable; as 19. *Hen.* 6. *&c.* Alſo he is charged in this action, for that he took money to return it, and did not.—And to the ſecond exception, it ſhall be intended that he continued in the office, for that he was under-ſheriff when the writ was delivered to him. And it is alledged, he cauſed the ſummons to be made, and did not return it at the day; by which it ſhall be intended that the authority was in him. And for this falſehood he is ſued, and it is found by verdict againſt him.—And it was adjudged for the plaintiff.

Tilley

CASE 2.

Tilley *against* Anthony Wye senior.

An indictment charging that on such a day *A. percussit B.* of which he languished till such a day and died; AND THAT *C. fuit adtunc et ibidem præsens, &c.* is not uncertain, for the *adtunc et ibidem* shall refer to the day on which the *stroke* was given.

APPEAL of murder by *R. Tilley* of the death of *G. Tilley* his brother against *A. Wye senior*. And declareth; that *An. Wye junior*, (who was absent, and whom he would appeal, if present) 18. *Feb.* 30. *Eliz. &c.* such an hour at *D. percussit* the said *G. Tilley* with a shot of a dag, of which he languished until the 26th day of *February* following, upon which day he died; and that the said *Anthony Wye junior* feloniously and voluntarily him did kill and murder; and that the said *A. Wye senior fuit adtunc et ibidem præsens abettans et comfortans* the said *A. Wye junior* the felony and murder aforesaid to do, &c.—ATKINSON for *A. Wye senior* (who was present) demurred upon this declaration in the appeal, because it is uncertain; for it is, that *A. Wye junior* such an hour and place made an assault upon the said *G. Tilley*, and there and then gave him a mortal wound, of which he died, &c. and that the said *A. Wye senior* was then present and abettant, &c. which is uncertain; for it may be he was present the same day, at the time when the assault was made, but was gone before the time of the stroke; and then he is not principal. 35. *Hen.* 6. *pl.* 48. In trespass the defendant justifieth, that at the time of the trespass supposed, he was parson, and took them for tithes. And it was no plea; for it may be he was at the time of the trespass supposed, and not at the time of the trespass done; so 35. *Hen.* 6. 12. trespass for lying in wait to beat him; the defendant saith, that at the time of the trespass supposed, and after, he was his villein: and yet not good; for it may be that he was not his villein at the time of the trespass done. 3. *Hen.* 7. *pl* 11. 10. *Edw.* 4. *pl.* 15. Also two days are mentioned; one the day of the stroke, and the other the day of the death; and it is alledged, that he was *adtunc et ibidem aidant, &c.* so is uncertain to which of the days it is to be referred.—CURIA *contra*. For when it is said that he was *adtunc & ibidem præsens, &c.* to the felony and murder in manner aforesaid doing, this must refer to the time of the stroke by which the felony was done.—WRAY said, if the indictment had been, that such a year, day, place, and hour, the said *A. Wye junior* made an assault and gave the stroke *ut supra*; and that the same year, day, and place, the said *A. Wye* who is now appealed was present; this had not been good; for it may be intended at another hour, because the hour was not mentioned: and therefore it hath been adjudged, that in such case the hour is necessary to be put into the indictment or appeal, when the felony was done; for he cannot be principal, when he is not at the same time present. But as it is now, it is well enough: for it is, that he was *adtunc & ibidem præsens, &c.* and cannot be intended but he was present at the same instant of time. And of this opinion were the other Justices; but they would advise, &c.

8. Hawk. 264.

Co. 4. 40. a.

CASE 3.

Hedd *against* Chalenor.

An ejectment is good, although the name of the lessor was *Joban*, and in the lease it was *Jane*. Ante, 59. 149.

EJECTIONE FIRMÆ. And declares upon a lease by indenture made by *Jane Beard*. The jury found, that the true name of the lessor was *Joban*, but she let the land by the name of *Jane*, and prayed the discretion of the Court.—This being moved, WRAY, C. J. said, the names are both one; and so it had been

2. Roll. Abr. 42. 135. Cro. Jac. 425.

adjudged before this time in this place, upon conference with the grammarians, that *Jane* and *Johan* is one name.—GAWDY ſaid, the action is not grounded upon the indenture, but upon the leaſe, and the indenture is but an enforcing of it, and it is found ſhe let, &c.—And afterwards, notwithſtanding this variance, it was found for the plaintiff.

HEDD *againſt* CHALENOR.

Spire *againſt* Roſs.

CASE 4.

ACTION upon the 5. *Eliz.* c. 9. for perjury. It was found for the defendant, and nine pounds aſſeſſed for coſts to him. It was moved that coſts ſhall not be given againſt the plaintiff, for he ſueth as a *party grieved*, and not as a *common informer*, and ſo not within the 28. *Eliz.* c. 5. But it was anſwered, that coſts ſhall be here upon the 21. *Hen.* 8. c. 19. which giveth it upon every action upon ſtatute.—GAWDY. This cannot be, for the 5. *Eliz.* c. 9. was made after that ſtatute. *Quere of it.*

Quere, If a defendant in an action for perjury on 5. Eliz. c. 9. is intitled to coſts? Hutton, 22. 1. Brownl. 66. 2. Leon. 116. 1. And. 116.

1. Salk. 30. 1. Bac. Abr. 517. 520. 2. Hawk. 390. Vide 3. Burrow, 1724. in point.

Lewis Vanvivée *againſt* Mich. Vanvivée.

CASE 5.

DEBT upon a bond. The condition was to ſtand to the arbitrament of *J. S.* of all controverſies between them. *J. S.* arbitrated that the defendant ſhould deliver to the plaintiff ſix *Kentiſh* cloths, which were bartered by *J. D.* for the thread of the plaintiff; and the breach was aſſigned in this point; and after verdict for the plaintiff.—FENNER alledged in arreſt of judgment, that this is out of the ſubmiſſion, for it appeareth not there was any controverſy for it; and ſo void.—CURIA. It ſhall be intended to be in controverſy, if the contrary be not ſhewn, and that they were in the hands of the defendant.—And it was adjudged for the plaintiff.

An award ſhall be intended to be within the terms of the ſubmiſſion, unleſs the contrary appear.

Herd *againſt* Burſtowe.

CASE 6.

ERROR in a judgment in a *ſcire facias* upon a recovery in debt. —Firſt error. Becauſe the plaintiff ſued a *ſcire facias* after the year to have execution by attorney, without a new warrant of attorney, which ought not to be; as 33. *Hen.* 6. *pl.* 49. 34. *Hen.* 6. *pl.* 51. But it was ſaid, he ought at firſt to aſſign this for error, and to ſay that there is not any ſuch record of a warrant of attorney, for this is a ſeveral record from the body of the record; and he ought to have a *certiorari* to certify it. To which GAWDY agreed, there being no other Juſtice preſent.—Second error. This is a *ſcire facias* againſt the bail, for the non appearance of the principal; and it is not mentioned that proceſs was awarded againſt him, but that it was prayed, *et ei conceditur*; but it is not, *ideo præceptum eſt vicecomiti, &c.* as it ought to be; and although he that was bail doth afterwards appear, this might be without proceſs, and ſo not good.—Thirdly, The name of the bailiff that ſerved the proceſs is not to the return of it. But it was ſaid, that this is by ſtatute, which doth not extend to a bailiff, but to the ſheriff.—Fourth error. Judgment was given without demurrer or iſſue joined; and although there need not be a declaration in this caſe, no more than in a *per quæ ſervitia*, or a *quid juris clamat*, for

A *ſcire facias* againſt bail muſt ſhew that proceſs iſſued againſt the principal; and an iſſue muſt be joined on it, or the judgment will be erroneous. Ante, 84. 153.

HERD *againſt* BURSTOWE.

theſe are declarations in themſelves, yet there ought to be a plea to it, and the plaintiff to reply to it; and upon the pleadings there muſt be an iſſue or demurrer, and then a judgment, and not otherwiſe, except upon a *nihil dicit*.—For the ſecond and fourth error, the judgment was reverſed. *Vide* 10. *Edw.* 4. *pl.* 7. 11. *Hen.* 4. *pl.* 5. 25. *Edw.* 4. *pl.* 15.

CASE 7.

Tranſam's Caſe.

A *conſiſtory* court may award coſts; and if the cauſe be removed to the *arches*, the proceſs for the coſts ſhall not be prohibited, though the iſſue was triable at common law. Poſt. 228.

Cowper, 422.

PROHIBITION. The caſe was, *Tranſam*, parſon of *Denham*, ſued one for tithes in the court of *Norwich*; and one that was parſon of *Stonham*, a pariſh adjoining, came in for his title; and ſaid that the land for which tithes were demanded, are within his pariſh of *Stonham*, and not within the pariſh of *Denham*. Upon this they were at iſſue; and found for him, and ſentence given for him. *Tranſam* appealed to the archbiſhop; and pending the appeal, coſts were aſſeſſed againſt him in the court of *Norwich*, according to the 32. *Hen.* 8. c. 7. and proceſs againſt him there: and becauſe the iſſue was triable at the common law, he brought a prohibition to the court of *Norwich*. But for that no ſuit was there depending, but he had removed it before the archbiſhop by appeal, a conſultation was awarded, for they might well proceed for coſts: but if he had not removed it, a prohibition had well been grantable; and he might have had it, though he was party to the libel.

CASE 8.

Sale *againſt* Marſh.

To accuſe another of having forged a writ of *quare impedit* is actionable.

Yelv. 146. 1. Hawk. P. C. 338. 3. Mod. 66. 12. Mod. 493. 496. Stra. 69.

ACTION for theſe words: "Thou haſt uſed juggling with me, "but thy juggling ſhall not ſerve thy turn, and haſt forged a "writ of QUARE IMPEDIT (*innuendo* a writ of *quare impedit*) againſt "him and the biſhop of *Coventry*." After verdict it was moved by LEWIS, that the words were not actionable.—CURIA. The firſt words are not actionable, but the laſt will well bear an action. —And the plaintiff had judgment.

CASE 9.

Dabridgecourt *againſt* Smalbrooke.

An *aſſumpſit* will lie on a promiſe to an under-ſheriff to indemnify the ſheriff againſt an eſcape in conſideration of his delivering the warrant to a particular perſon.

Ante, 175. Poſt. 190. 230. 271. S. C. Owen, 79. 10. Co. 101. b. Roll. Abr. 16. Leon. 132. 3. Leon. 227. 1. Term Rep. B. R. 419.

ASSUMPSIT. That whereas the defendant had recovered a debt againſt *Lane*, and had a *capias ad ſatisfaciendum* directed to the ſheriff of *Warwick*, and delivered it to the plaintiff being then ſheriff there, in conſideration that he would make *J. S.* (whom the defendant did then name) his ſpecial bailiff to ſerve his proceſs, that if the ſaid *Lane* did eſcape, he would take no advantage againſt the plaintiff (whereas in truth the delivery of the writ and the promiſe was to *S.* under-ſheriff of the plaintiff, and not to the plaintiff himſelf); and alledges *in facto*, that he at the defendant's requeſt made *J. S.* his ſpecial bailiff, who arreſted the ſaid *Lane*, and ſuffered him to eſcape; and that the defendant againſt his promiſe had taken advantage of this eſcape, and had ſued him and recovered ſo much, &c. and upon *non aſſumpſit* pleaded, it was found for the plaintiff.—And it was alledged in arreſt of judgment, that this is no conſideration; and that the *promiſe* was againſt the 23. *Hen.* 6. c. 10.—CURIA. An *aſſumpſit* is within the ſtatute, and is as void as an obligation, but here it is not contrary to the ſtatute; and

and it is a good conſideration, that he ſhould make one his ſpecial bailiff, which otherwiſe he would not do, nor truſt him; but would have made his warrant to his own bailiff, which was ſworn, and peradventure bound to ſave him harmleſs againſt eſcapes, &c. —And it was adjudged for the plaintiff (*a*). DARRINGE-COURT *againſt* SMALBROOKE.

(*a*) Confirmed upon a writ of error to the exchequer chamber. Vide poſt. 271.

Purſell's Caſe. CASE 10.

HE was indicted of felony before the Juſtices of gaol delivery in the county of *Somerſet*, and outlawed upon it; and brought error, becauſe in the indictment he is ſuppoſed to be of *London*, and the *capias* was awarded to the ſheriff of *Somerſet*; whereas by the ſtatute 8. *Hen.* 6. c. 10. it ought to be to the ſheriffs of *London*, in which he inhabited; and for this cauſe the outlawry was reverſed (*a*). And exception was taken to the indictment, which was taken and found before the Juſtices of gaol delivery, who have not authority to take indictment unleſs they be juſtices of peace. 3. *Mar. Brook.* "*Commiſſions*" 24.—And for this cauſe the indictment was alſo diſcharged (*b*).

Outlawry in felony may be avoided by *writ of error*, if the *capias* has iſſued contrary to 8. Hen. 6. c. 10. and if the indictment was taken by juſtices of "*gaol delivery*," it ſhall be quaſhed.

(*a*) 3. Co. 59. Plowd. 137. 2. Hawk. 434. 3. Bac. Abr 770. (*b*) Cro. Jac. 358. 2. Hawk. P. C. 32. *contra*.

Hadman and Green *againſt* Ringewood. CASE 11.

IT was moved by TANFIELD, that the action was not well brought, becauſe it was ſuppoſed *ad damnum ipſorum*, whereas it ſhould be *ad damnum parochianorum*. 8. *Edw.* 4. *pl.* 6.—COKE. It may be either way. And he ſaid the precedents are both ways, and executors ſhall have treſpaſs of goods taken in the time of the teſtator, ſuppoſing it to be *ad damnum ipſorum*.—But afterward it was agreed that the churchwardens in whoſe time the goods were taken, may ſuppoſe it to be *ad damnum ipſorum*, or *ad damnum parochianorum*, at their choice; but the ſucceſſors muſt of neceſſity ſuppoſe it to be *ad damnum parochianorum*.—And for this cauſe it was adjudged that the plaintiff *nihil capiat per billam*.

An action by churchwardens for a treſpaſs in the time of their predeceſſor, muſt conclude *ad damnum parochianorum*. Ante, 145. Dalſ. 105. 1. Leon. 177. Cro. Jac. 234. 1. Hale, 512.

2. Hale, 181. 1. Hawk. 145. 2. Str. 852. Ld. Ray. 337. 5. Mod. 395. 2. Peere Will. 126.

Wolman *againſt* Tye. CASE 12.

Michaelmas Term, 31. & 32. *Eliz. Roll* 532.

ASSUMPSIT. That the defendant did aſſume, that if the plaintiff was ejected during the term by him or any other, that he would give him forty-ſeven pounds; and alledged, that he was expulſed during the term: and judgment was given for the plaintiff, and a writ of enquiry of damages awarded and returned.—It was moved in arreſt of judgment, that he alledged that he was expulſed during the term, but ſaith not by whom.—GAWDY, *Juſtice*, at firſt held, that by the plea of the defendant, who had pleaded a ſpecial plea, this matter was waived; and a demurrer was joined upon the plea.—But it was adjudged, that this was a thing material, and traverſable; and without alledging of it the plaintiff had no cauſe of action, and no plea of the defendant could make it good. As in an *aſſumpſit* to do a thing upon requeſt, if he doth not alledge the time and place of the requeſt, it is not good; and advantage may be taken upon it after *non aſſumpſit* pleaded. *Mich.* 32. & 31. *Eliz.*—It was adjudged for the defendant.

A declaration in *aſſumpſit* on a promiſe to pay ſo much if the plaintiff was ejected, muſt alledge *by whom* he was ejected. Ante, 74. Poſt. 675.

1. R. Ab. 71. b. 1. Saund. 33.

Case 13.

Harris's Caſe.

If an attorney ſue an attorney of another court or an Oxford ſcholar, the defendant ſhall not have privilege. Palm. 403. Dyer, 287.

ACTION upon the caſe was brought by an attorney of the queen's bench againſt *Harris*. He pleaded the privilege of *Oxford*, and prayeth, &c.—It was held he ſhould not have it, for the plaintiff being privileged here, no other privilege ſhall be allowed: ſo if an attorney here be ſued by an attorney of the common pleas, he ſhall not have his privilege. But notwithſtanding the defendant ſaid he would plead it at his peril.

Lit. Rep. 304. 1. Ld. Ray. 343. Strange, 837. 1141. Dougl. 312. 531.

Case 14.

Foxall *againſt* Venables.

Pariſhioners cannot preſcribe either in matter of *eaſement* or *intereſt*. Poſt. 363. 441.

ACTION upon the caſe. And declares, that he is an inhabitant in *D.* in the vill of *D.* and that all the inhabitants there, time out of mind, &c. had a way to the common, &c. and the defendant ſtopped it, &c.

It was moved by MASSY after verdict, in arreſt of judgment, that the inhabitants cannot preſcribe, but by way of uſage; and he hath not alledged title to the common.

EGERTON, *Solicitor*. Inhabitants cannot preſcribe for matter of intereſt, but for an eaſement they may; and the plaintiff need not make a title, becauſe the action is only for the diſturbance of the way: and that inhabitants may preſcribe for an eaſement, he relied upon 2. *Edw.* 4. *pl.* 5. & 25. *Edw.* 4. *pl.* 29. but to profit or commodity in the freehold of another, they cannot preſcribe. 7. *Edw.* 4. *pl.* 26. 18. *Edw.* 4. *pl.* 3.

GAWDY, *Juſtice*. There is no difference, but in both caſes they ought to alledge an uſage. 2. *Mar. Brook.* "*Præſcript.*" 100. 6. & 7. *Edw.* 6. *Dyer*, 71. 18. *Edw.* 4. 3.

WRAY, C. J. *contra.*—*Et adjournatur.*

Case 15.

Bugberd's Caſe.

Hilary Term, 31. *Eliz. Roll* 4. *and* 488.

A writ of reſtitution for mean profits, and a *ſi. fa. ad valentiam*, &c. may be joined, and executed on the day of the return. Ante, 162. Poſt. 468. 761.

2. Roll. Ab. 278.

ERROR in *quare impedit*, where damages were given for the queen; and the judgment was reverſed, *Mich.* 32 *placito* 44. The plaintiff had a writ of reſtitution awarded for the mean profits, and a *fieri facias ad valentiam de bonis & catallis* of the incumbent of the queen, and all in one writ returnable *Craſtino Trinitatis*: the ſheriff takes the inquiſition upon the day of the return of the writ, *viz. Craſtino Trinitat'* and returneth it.—And firſt, Exception was taken, that the inquiſition being taken upon the day of the return of the writ, was void; for the day is excluded, and is only for the return of it. 31. *Hen.* 6. *pl.* 13. 33. *Hen.* 6. *pl.* 45. —Second exception. In the writ of inquiſition there is compriſed alſo a *fieri facias*, which is not to be.

CURIA. The writ is well ſerved, and varieth from the caſe of the exigent, 33. *Hen.* 6. *pl.* 45. and of the *venire facias ad diem octabis*: there the day is excluded, but not here. But if it had been taken the ſecond day of *Craſt. Trinitatis*, and before the fourth day of *Craſt. Trinitatis*, it had not been good. As to the ſecond exception, they may be both in one writ. 6. & 7. *Edw.* 6. *Dyer*, the like proceſs.—And it was ruled accordingly.

Parkes

Parkes *againſt* Moſſe.

CASE 16.

Hilary Term, 31. Eliz. Roll 31.

ACTION SUR TROVER. The defendant pleaded a recovery againſt *J. P.* and that a *fieri facias* was awarded to the ſheriff; and after the writ awarded and delivered to the ſheriff, *J. Parkes* died poſſeſſed of the goods, and made the plaintiff his executor; and afterwards the defendant, by force of the ſheriff's warrant, took theſe goods in execution, as bailiff to the ſheriff, and delivered them to him. The plaintiff replieth, that the ſheriff returned upon the writ, *Tarde:* and upon this it was demurred in law.—Firſt queſtion. If the party dying after the writ of execution awarded, and before it was ſerved, if it may be ſerved upon his goods in the hands of his executor or adminiſtrator? And it was held it might; for by the execution awarded, the goods are bound (*a*), and the ſheriff need not take notice of his death. 26. *Hen. 7. pl. 5.* 6. *Edw. 6. Dyer*, 76.—Second queſtion. If the falſe return of the ſheriff ſhall make the bailiff puniſhable for that he did lawfully? for he was a bailiff errant, and a mere ſervant to the ſheriff, and not a bailiff of a franchiſe. And it was held clearly that it ſhould not; for by the execution by the bailiff, the party was diſcharged of the execution; and therefore, it is not reaſon he ſhall take advantage againſt the bailiff.—And it was adjudged for the defendant.

If a defendant die after *fi. fa.* awarded, the goods may be taken in the hands of his executor; and the officer ſhall not be affected by a falſe return. Ante, 174. 12. Mod. 130. 2. Vent. 218. 1. Ro. Ab. 893. 2. Ro. Ab. 562. Moor, 352. 873. 1. Leon. 144. 1. Mod. 188. Cro. Car. 149. 447. 8. Co. 171. Cro. Jac. 451. Ld. Ray. 695. 808. 850. 1073. 3. Peere Will. 399. 1. Term Rep. 361. 729.

(*a*) But now by 29. Car. 2. c. 3. no writ of execution ſhall bind the property but from the time of its *delivery* to the ſheriff. 5. Mod. 377. 1. Salk. 320. Skin. 257. 2 Mod. 310. 2. Vent. 218. Burr. 271.

Williams *againſt* Aſhet Aſh.

CASE 17.

Trinity Term, 30. Eliz. Roll 2322.

EJECTIONE FIRMÆ. It was upon ſpecial verdict found, that the corporation of Mercers, *London*, were ſeiſed of the lands in queſtion, in the ſeveral poſſeſſions of two men; and being ſo ſeiſed made a deed of leaſe to the plaintiff, and a letter of attorney to *J. S.* to deliver the deed and the poſſeſſion. The attorney enters upon the poſſeſſion of one of the men, and there delivers the deed; and after enters into the poſſeſſion of the other, and there doth deliver the deed. The queſtion was, If this were good for the land for which the ſecond delivery was? for as to the firſt, it was held without queſtion, that it ſhall paſs; but for the ſecond the doubt was, becauſe one deed cannot have two deliveries.

A verdict in ejectment which finds that the leſſor of the plaintiff was ſeiſed of the lands in queſtion, precludes the enquiry whether the deed was properly delivered. Ante, 167.

But THE COURT held, that as the verdict is found, this matter doth not come in queſtion; for the jury found that the corporation was ſeiſed; and being ſo ſeiſed made the deed; and then there is no impediment but that the delivery ſhall be good for all, for it ſhall not be intended but that the two men had poſſeſſion only as tenants at will to the corporation; and then the delivery of the leaſe in one place is good for all; and it ſhall not be intended that they had an eſtate for years or life, except it be ſo ſhewn. And here the defendant would have pleaded entry after the verdict in abatement of the writ: but it was held clearly he had not day to plead it, but is put to his *audita querela*.—And judgment was given for the plaintiff.

CASE 18.

Sir Francis Willoughby and Ralph Sacheverel *againſt* Patrick Sacheverel, &c.

Treſpaſs laid with a *continuando* is good, notwithſtanding an intermediate entry by the plaintiff.

ATTAINT. Upon evidence it was moved, that whereas *Patrick Sacheverel* had brought an action of treſpaſs againſt the now plaintiffs for breaking his cloſe, and depaſturing his graſs with their cattle, *anno* 15. *Eliz.* and continuing the ſaid treſpaſs *diverſis diebus & vicibus* until the day of the writ purchaſed, which was 28. *Eliz.* Upon evidence it appeared that *Sir Francis* and *Ralph* had entered and occupied for half a year, and afterward *Patrick* entered and occupied it for a time; and after *Ralph* entered, and after *Patrick* entered, and after *Ralph* re-entered and occupied it till the day of the writ purchaſed. The queſtion was, If this entry by *Patrick Sacheverel* be not ſuch an interruption of the treſpaſs, that he ſhall be forced for every treſpaſs to have ſeveral actions, or that one action with a *continuando* will ſerve for all? —THE COURT held clearly, that one action of treſpaſs with a *continuando* will ſerve for all; and it may well be brought with a *continuando*.

Another queſtion was moved, becauſe it appeared that *Sir Francis* entered only at the firſt, and not after that *Patrick* had reentered; and yet the jury had found *Sir Francis* and *Ralph* guilty of the treſpaſs, and had aſſeſſed entire damages 310l. and in this it was ſaid they had found falſely, and had given exceſſive damages againſt *Sir Francis*.—But THE COURT held clearly, that they might ſafely find them both guilty of the treſpaſs. But it ſeemeth the damages were exceſſive againſt *Sir Francis*; and they had done better if they had found *Sir Francis* guilty only of the firſt entry.

CASE 19.

Utty Dale's Caſe.

A leaſe to *A.* for life, and for the lives of *B.* and *C.* is an eſtate *pur autre vie*, and does not determine on the death of *A.* Poſt. 491.

HANHAM, *ſerjeant*, demanded the opinion of THE COURT in this caſe. A leaſe is made to *J. S.* "to have and to hold, to "him and his aſſigns for his own life, and for the life of *A.* and *B.*" *J. S.* dieth; If his eſtate be determined? becauſe one cannot have a greater eſtate of freehold than his own life.

Co. Lit 41. b. *in notis*. 5. Co. 13. a. 2. Wood's Con. 37.

ANDERSON and THE COURT held clearly it is a good limitation, and he hath an eſtate for all their three lives; for although he himſelf cannot have an eſtate but for his own life, yet he may have it to grant to another, and the *habendum* for their three lives is a good limitation; and by his death the eſtate is not determined, but *occupanti conceditur*. And it was ſaid by ANDERSON and PERIAM, that if tenant *pur auter vie* makes a leaſe for years to commence after his death, this is good, and ſhall prevent an occupant (*a*); for the land is bound with this intereſt of the leſſee; and he ſhall have it againſt all others, during the life of *ceſtuy a que vie*.

(*a*) See 29. Car. 2. c. 3. and 14. Geo. 2. c. 20.

William

William Coke de Inner Temple *againſt* Ro. Bacon.

CASE 20.

A releaſe of *part* of a defeaſance, and of *all actions*, is only good for *the part*.

AUDITA QUERELA upon a recognizance, of which there was a defeaſance for payment of a leſſer ſum; and ſhewed a releaſe of 155l. parcel of the ſum contained in the defeaſance, and of all actions for it.—And by all THE COURT, the releaſe doth not extend to all, but only to the ſum contained in the releaſe; and the whole recognizance is not rehearſed, but only this parcel; and he was put to ſhew other releaſes for the reſidue.

St. Auby's Caſe.

CASE 1.

Eaſter Term, 31. Eliz.—In the Exchequer.

A rent *for life* granted out of a term *for years* in lands, is a chattel, and ſhall be ſatisfied out of the term, till the one or other eſtate determines.

THE caſe was, *The Earl of Arundel* being poſſeſſed of a term for years in lands, grants a rent to *St Auby* for his life, iſſuing out of the ſaid lands, and dieth. This is found by office, and the land now being in the queen's hand, DREW prayeth an allowance of this rent, the term yet having continuance for divers years.

But POPHAM, *Attorney General*, moved, it was a void grant to charge the land, for he cannot have a franktenement out of a chattel; and if he hath not a franktenement according to the word of the grant, he can have no other eſtate, for it is not granted for any time certain.

MANWOOD, *Chief Baron*. Although this cannot be a grant to make a freehold, yet it ſhall be a grant as it may be, *viz.* a grant for ſo many years as the term endureth, if he live ſo long; for it is not a franktenement in law, but a chattel.—And to this opinion GENT and CLERK, *Barons*, inclined; but ſaid, they would adviſe.

7. Co. 23. 51.

Short *againſt* Helyar.

CASE 2.

Hilary Term, 32. Eliz. Roll 444.

Proceſs teſted on a Sunday may be amended after verdict. Poſt. 203. 781. Moor, 684. Cro. Jac. 162. Strange, 138. in C. B. 9.

ERROR IN TRESPASS.—Firſt, The *venire facias* bore *teſte* upon the *Sunday*, which is not *dies juridicus*. *Sed non allocatur*, for it is helped by the 32. *Hen.* 8. c. 30.—Second error. Treſpaſs was, *pro defalcatione herbæ, & herbæ conculcatione pedibus ambulando, continuando, quo ad depaſturationem & conculcat' herbæ, &c.* whereas depaſturing was not mentioned before.—But it was held but ſurpluſage; and judgment was affirmed (*a*).

1. Com. Dig. 316. 1. Term Rep. 782. 3. Term Rep.

(*a*) See 4. & 5. Ann. c. 16.

Trinity Term,

32. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Elnor's Caſe.

If an indictment refers, with equal uncertainty to two counties, it is void. Ante, 101.

2. Hawk. P. C. 336. Caſes in Crown Law, 88.

ELNOR AND OTHERS were indicted upon the 8. *Hen.* 6. c. 9. of forcible entry. The indictment was, *quòd cum in ſtatuto parliam. tent' apud Weſtm. in comitat' Middleſex, &c. quòd* JOHANNES ELNOR and others, &c. *de Slimbridge in comitat. prædict' apud S. prædict. in com' prædict'* one cloſe, being the freehold of *the Counteſs of W.* with force and arms, &c. had entered, &c. and her *expulit et diſſeiſivit, &c.* Exception was taken to this indictment, becauſe it is not certain in what county *Slimbridge* is, in which the land is ſuppoſed to lie; for there are two counties named before, *ſcil.* GLOUCESTER and MIDDLESEX, ſo in *com' prædict'* is uncertain; and if it be referred to that which is named laſt, as it ſhall be moſt properly referred, then it is to *Middleſex*; and an indictment taken in the county of *Glouceſter* of land in *Middleſex* is void.—And for this cauſe principally the indictment was held inſufficient; and the parties were diſcharged.

CASE 2.

Dalton *againſt* Selly.

Money cannot be *attached* before it is due. Ante, 172. Poſt. 712.

1. R. Abr. 553. 1. Sid. 327. 3. Leon. 236. *con.* 1. Bac. Abr. 692.

DEBT. It was held PER CURIAM, that a foreign attachment cannot be of a debt before it be due; and therefore whereas one was indebted in a ſum of money to be paid at *Michaelmas*, and it was attached before *Michaelmas*, but the judgment of the attachment was not till after *Michaelmas*, it was clearly held to be void, becauſe it was not due when attached.

CASE 3.

Cowleigh *againſt* Edwards.

Eaſter Term, 32. *Eliz. Roll* 310.

The traverſe of an immaterial matter is bad. Ante, 168. Poſt. 379. 705. 842.

5. Com. Dig. 117.

FALSE IMPRISONMENT. For impriſoning him at *Briſtol*. The defendant juſtifieth that he arreſted him at *Glouceſter*, by virtue of a commiſſion of rebellion, ABSQUE HOC that he was guilty at *Briſtol*.—And it was moved that the traverſe was not good, for the cauſe of the juſtification is not local, and ſo might juſtify in the place where the action was brought; otherwiſe it is, if the commiſſion had been to arreſt him at *Glouceſter*.—And ſo was the opinion of WRAY: *ſed adjournatur.*

Chriſtian

Chriſtian Plaice *againſt* William Howe.

CASE 4.

Hilary Term, 32. Eliz. Roll 432.

ACTION for theſe words: "Thou haſt taken a falſe oath in the "conſiſtory court at *Exeter*;" and, If the action lay for theſe words? The defendant did demur in law; and it was alledged that the action lay not, for it may have a good intendment; for every judge before whom an oath is taken may be ſaid to take a falſe oath, not of himſelf, but of another before him.—Secondly, This is not a perjury puniſhable here, for the 5. *Eliz.* c. 9. extends not to perjuries in the ſpiritual courts, and ſo is not puniſhable by the common law.—CURIA *contra*. As to the firſt, it cannot be intended, the plaintiff being a woman, before whom no oath can be taken: and to the ſecond, although it is not puniſhable by the ſtatute, yet it is a great defamation, ſo that none will credit her in any thing: as to ſay of a merchant "he is a bankrupt," for the diſcredit; and though the ſtatute extends not to it, yet it leaves it to be puniſhed as it was before; ſo that it is puniſhable in the ſtar-chamber.—It was adjudged for the plaintiff.

Words actionable.—"Thou "haſt taken a "falſe oath in a "conſiſtory "court," improt perjury. Poſt. 297. 429. 583. 609. Ante, 135. 1. Roll. Ab. 40. Cro. Car. 436. Hob. 283. Hard. 151. Moor, 404. 537. Noy, 34. 1. Hawk. P. C. 319.

Edwards *againſt* Watkin.

CASE 5.

Eaſter Term, 32. Eliz. Roll 18. or 189.

ERROR IN TRESPASS. The writ was *quare clauſum fregit*, and the count was *clauſa fregit*: and for this variance the judgment was reverſed.

Variance. Poſt. 198. 2. Vern. 153.

5. Com. Dig. 24, 25. 2. Wilſ. 394. 2. Salk. 658. 701. 4. Mod. 246. 6. Mod. 303. 2. Ld. Ray. 1209.

Lucas *againſt* Donne.

CASE 6.

Michaelmas Term, 31. & 32. Eliz. Roll 394.

ERROR of a judgment in the court of *Helſton*. He ſheweth not what court it was, nor by what title it was held; and the count was in *Engliſh*.—And for theſe cauſes the judgment was reverſed (*a*).

Judgment reverſed for not ſhewing in what court it was given. Ante, 85.

Cowper, 18. 1. T. Rep. 151.

(*a*) By 4. Geo. 2. c. 26. and 5. Geo. 2. c. 27. all proceedings in law are now to be in Engliſh.

Devered *againſt* Ratcliffe, late Sheriff of London.

CASE 7.

Eaſter Term, 32. Eliz. Roll 339.

DEBT for an eſcape. And counts, that whereas he had a judgment in debt againſt one in *London*, and a *cap. ad ſatisfac.* againſt him, upon which a *non inventus* was returned, for which one of his ſureties, being in priſon there upon a plaint there, under the cuſtody of the defendant, was detained in execution *ſecundum conſuetudinem civitatis prædict.* as appeareth by the record there, and after he eſcaped, &c. Upon this the defendant demurreth.—Firſt cauſe. For that it is not expreſsly ſaid that there was ſuch a cuſtom, but only *ſecundum conſuetudinem*, &c.—Secondly, The recognizance of the bail is joint, and only one is commanded to be detained in execution.—Thirdly, The cuſtom is not good, for he ought to have a *ſcire facias* againſt the bail, for it is unreaſonable to take him

A cuſtom to charge the bail in execution upon the return of a *ca. ſa.* againſt the principal, without a *ſcire facias* againſt them is void. Poſt. 199. 1. Roll. Abr. 1. Sid. 339. Bro. Abr. 66. pl. 85. Hob. 195. Allen, 12. 2. Leon. 29. Palm. 567. 565. 891. 1. Bac. Abr. 673. 2. Wilſ. 204. Dougl. 204. 2. Blac. Rep. 768.

in

Devesed *against* Ratcliffe.

in execution without anſwer; for he might plead a releaſe of the party, or that the principal is dead, and ſo diſcharge himſelf, &c. —And for theſe cauſes it was held the declaration was not good, and the cuſtom unreaſonable: and the plaintiff had judgment.

Case 8.

Wood *againſt* Payne.

Ejectment *de uno meſuagio five tenemento*, and 4. acres of land *pertaining*, judgment may be given for the land.

1. Sid. 895. Pop. 203. 2. Mod. 355. Stiles, 364. Cro. Jac. 125. Hardres, 173. Ld. Ray. 191. 317. 2. Strange, 834. 1. Barnes, 147.

EJECTIONE FIRMÆ. After verdict it was alledged in arreſt of judgment, that the declaration was uncertain, *viz. de uno meſuagio five tenemento*, and four acres of land to the ſame belonging; and for this uncertainty it was held clearly no judgment ſhall be given of the meſſuage, nor of the damages or coſts, for they are intire.—But judgment was prayed for the four acres: but to that it was ſaid to be uncertain alſo, for it appeareth not to which of them they did appertain.—But Gawdy ſaid, the words (*pertaining*) are void; for land cannot properly belong to a houſe, as *Hill v. Grange* is; and then it is as a declaration of meſſuage or tenement, and four acres of land; which though it be void for the firſt, it is good for the land: and thereupon the plaintiff releaſed the damages, and for the four acres had judgment. And it was ſaid that in *Mich.* 27. & 28. *Eliz.* ſuch judgment was given in *Whitton v. Roberts.* 173. Vide Cottingham v. King, 1. Burr. 623. 2. Bac. Abr. 169. 2. T. Rep. 11.

Case 9.

Kerry *againſt* Bower.

A plaintiff may *attach* a debt recovered, in his own hands. Ante, 63.

3. Roll. Abr. 552. 554. Dyer, 196. 1. Brownl. 60.

AUDITA QUERELA. For that the defendant recovered againſt him this debt in this court, and was in debt to the plaintiff in another debt, he attached it in his own hands in *London*, and upon this brought the *audita querela*.—And it was clearly held, the *audita querela* did not lie; for this inferior court cannot fetch this debt out of this court; and this debt is not attachable, as it was adjudged in *Sir John Parrot's Caſe*. And execution was awarded.

Case 10.

Farr and Eaſt.

An indictment of forcible entry diſcharged for a miſ-recital of the ſtatute. Poſt. 307.

Noy, 120. 125. Cro. Jac. 32. Stra. 443. Ld. Ray. 382. 2. Hawk. 352.

THEY were indicted upon the 8. *Hen.* 6. c. 9. and three exceptions were taken to the indictment.—Firſt, The entry is ſuppoſed to be into a houſe, and twenty acres of land, *& eum diſſeiſivit*, but ſaith not "*inde*." *Sed non allocatur*, for it ſhall be intended.—Secondly, There was not *contra pacem*; which Gawdy held material. Wray *contra*. For is is *vi & armis, &c. et contra formam ſtatuti, &c.* which doth imply ſo much.—Thirdly, The ſtatute is, if a recovery in aſſiſe, or action of treſpaſs by verdict, or in any other manner, &c. and theſe words, "*or in any other manner*," are omitted, ſo the ſtatute is miſ-recited. And this was held a material exception, for in this the ſenſe of the ſtatute is altered, for this is tyed to a recovery by verdict only; but if it had been miſ-recited in a point not material, it had been otherwiſe: and the indictment was diſcharged.

Magdalen

Magdalen Chamberlaine *againſt* Thorpe.

CASE 11.

Eaſter Term, 32. Eliz. Roll 186.

DEBT upon a recognizance taken in *London*. And declareth, that the mayor there had uſed to take recognizances by cuſtom of all except infants and *feme-coverts*, and upon any day except *Sunday*, and certain other days ſpecially named, and this recognizance was taken before the mayor there.—TANFIELD alledged divers exceptions in arreſt of judgment.—Firſt, The cuſtom is unreaſonable, *viz.* to take recognizances of all perſons, except *feme-coverts* and infants, and doth not except men *de non ſane* memory. *Sed non allocatur*; for ſuch may acknowledge a recognizance, and have no remedy to avoid them; and therefore they are excepted which may.—Second exception. That it is not averred that the defendant was not an infant, &c. or that the day upon which it was taken, was none of the excepted days. *Sed non allocatur*; for it ſhall be intended, if the contrary be not ſhewn by the defendant. And ſo THE JUSTICES ſaid the law is clearly taken at this day upon the 1. *Rich.* 3. c. 1. to plead a feoffment by *ceſtuy a que uſe*.—Third exception. That none can take recognizances but Juſtices of record which had authority by patent, &c. as the Juſtices of the benches and juſtices of peace by commiſſion; and the mayor is not a judge of record, but by cuſtom. *Sed non allocatur*; for the cuſtom is good, and the cuſtoms of *London* are confirmed by parliament, and are good though ſtrange; and ſo it was adjudged in this court between *Mabbe and Erwing*.—Fourth exception. The cuſtom extends as well to recognizances taken of ſtrangers as citizens, or for matters within the city. And for this cauſe GAWDY held it was not good.

Cuſtom of London to take recognizances of *citizens for matters within the city*, with exception to particular days and perſons is good.

1. Roll. Abr. 557. 4. Co. 64. 2. Inſt. 395. Co. 4. 124. a.

See 8. Hen. 6, c. 9.

Watkins *againſt* Johns.

CASE 12.

TRESPASS for aſſault, battery, and breaking of a pack of cloths, and taking one cloth out of it, &c.—The defendant as to the aſſault and battery pleads not guilty; and as to the pack of cloths, &c. he juſtifieth, for that the queen granted the office of *aulnage* with the moiety of the profits of it to *W. Owen*; and that the ſaid *Owen* by his deed, bearing date, &c. at ſuch place, made him his deputy, and becauſe the plaintiff did offer to ſell this pack of cloths, not having the aulnage ſeal to it, contrary to the ſtatute, he ſeiſed it as forfeited. Upon this plea there was a demurrer.—SNAGG, *ſerjeant*, for the plaintiff argued,—Firſt, The plaintiff declares of the breaking of a pack of cloths, and taking a cloth out of it; and he anſwers to the taking of the pack, but not to the taking of one cloth out of it, which is ſpecially mentioned.—Secondly, He reciteth not the ſtatute which makes the office of aulnage.—Thirdly, He ſheweth that the defendant offered to ſell it contrary to the ſtatute, and ſheweth not which ſtatute, and there are two ſtatutes which give ſeveral puniſhments, *viz.* 27. *Hen.* 8. c. 8. ſ. 12. & 6. *Edw.* 6. c. 6. (*a*).—Fourthly, He juſtifieth by deputation from *Owen*, but ſheweth not that the office was granted to him to exerciſe by deputy; for this is an office of truſt, and otherwiſe cannot make a deputy.—Fifthly, He pleadeth that *Owen* by deed dated at *Abergavenny*

Pleading in treſpaſs.

(*a*) 2. Hawk. 349. 357. Strange, 602. 843. 1066. Ld. Ray. 1518. Dougl. 425.

WATKINS *againſt* JOHNS.

gavenny made him his deputy, but ſheweth not the place where the deed was made which is iſſuable, for it may bear date at *Abergavenny*, and yet ſealed and delivered at another place; and ſo there is no place from whence the *venue* ſhall come, if the deed be denied. —And for theſe cauſes the plea was held clearly inſufficient: and it was adjudged for the plaintiff.

CASE 13.

A real compoſition to be diſcharged from the payment of tithes is not good, even againſt the parſon himſelf, if it be not by fine or deed. Poſt. 249.

2. Roll. Ab. 63. Godb. 374. Cro. Jac. 137. 317. 613. Hob. 176. Sed vide 3. Com. Dig. 91. 3. Bac. Ab. 337. Ante, 136.

Bugg and Nelſon *againſt* Woodward.

PROHIBITION. For ſuing for tithes in court chriſtian: and doth ſuggeſt that one *Prettiman* was ſeiſed of the land of which the tithes are demanded; and in conſideration of five pounds paid by him to the ſaid parſon (*Woodward*) *concordatum & agreatum fuit* between them, that he and his aſſignees ſhould hold the land diſcharged of tithes during the life of the parſon; and that afterwards he let it to the plaintiff, and upon this a prohibition was granted. And it was held he need not make proof of it, for it was a compoſition with the parſon himſelf who ſued. And a conſultation was prayed, for the agreement is without deed; and being for no time certain, but for the life of the parſon, it cannot be good without deed; and it is only an agreement, and no grant to be diſcharged; and a grant of tithes to a ſtranger cannot be without deed (*a*), no more can it be to the party himſelf that is tenant of the land. It was ruled in the common pleas, *Weſcled v. Pepper*, that a *concordatum et agreatum* between the parſon and his pariſhioner, that for twenty ſhillings rent he ſhall have his tithes for twenty years if the parſon ſo long live, that a prohibition lieth not; yet there it was perſonal, and here for life.

GAWDY, *Juſtice*. A grant for life of tithes is not good without deeds, but here it is a contract for money. 21. *Hen.* 6. *pl.* 43. Leaſe for years of tithes is good without deed. *Et adjournatur* (*b*).

(*a*) See 5. Geo. 3. c. 17. (*b*) This caſe was moved again, and a conſultation granted. Poſt. 249.

CASE 14.

A ſheriff cannot juſtify an eſcape in a civil ſuit, becauſe the proceſs was erroneouſly awarded. Ante, 165. 271. Poſt. 466.

Buſhe's Caſe.

DEBT upon an eſcape againſt a ſheriff. He pleads *nihil debet*; and by verdict it was found, that the plaintiff recovered againſt *J. S.* in debt, and after the year paſſed, had a *capias ad ſatisfaciendum* againſt him, and the ſheriff by force of it took him, and ſuffered him to eſcape; and, If upon this matter he was chargeable for this debt? was the queſtion.—And it was adjudged he ſhould; for though the proceſs was erroneouſly awarded, yet it was ſufficient for the ſheriff to arreſt him; and he might juſtify in a falſe impriſonment; and therefore cannot let him at large.

Bull. N. P. 66. Jac. 3. 280. 289. 396. 2. Salk. Gilb. Ex. 82, 83.

Moor, 274. Dyer, 175. Pop. 203. 1. Leon. 30. 5. Co. 64. 8. Co. 141. Cro. 2. Bulſt. 64. 2. Saund. 100. 3. Mod. 325. Carth. 148. 234. 5. Mod. 413. 12. Mod. 700. Ld. Ray. 397. 776. 1530. Stra. 509. 820. 1184. Salk. 273. 4. Bac. Ab. 451.

CASE 15.

If a juror who was challenged appear on the *tales* and try the cauſe, judgment ſhall be ſtayed. 2. Cro. 29.

Hungate *againſt* Hamond.

A JUROR was challenged and withdrawn; and upon a *tales* awarded, and proceſs againſt the other jurors, he appeared amongſt them, and was ſworn, and tried the iſſue. And this being alledged in arreſt of judgment, it was held erroneous, and the judgment ſtayed.

Richard

Richard Cotton's Caſe.

CASE 16.

EJECTIONE FIRMÆ. Upon evidence it was held, that if a diſſeiſor makes divers ſeveral leaſes for years, and the diſſeiſee enters into one part in the name of all, this is good for all, for they are all derived out of one freehold; and that an entry upon part of the land is an entry into the houſe, which is in another part of the land.

An entry into part of lands is good for the whole.
Ante, 167.
1. R. Abr. 738.
Co. Lit. 252.

Metcalfe *againſt* Deane.

CASE 17.

THE jury were gone from the bar to confer of their verdict. One of the witneſſes that was before ſworn on the part of *Deane*, was called by the jurors; and he recited again his evidence to them, and after they gave their verdict for *Deane*. Complaint being made to the Judge of the aſſiſes of this miſdemeanor, he examined the inqueſt, who confeſſed all the matter, and that the evidence was the ſame in effect that was given before, & *non alia nec diverſa*.

This matter being returned upon the *poſtea*, the opinion of THE COURT was, that the verdict was not good, and a *venire facias de novo* was awarded. *Vide* 35. *Hen.* 6. "*Examination*" 17. 11. *Hen.* 4. *pl.* 17. and BROWNLOW cited a precedent, *Leming v. Kempe*, accordingly.

A *venire facias de novo* awarded, becauſe one of the witneſſes had recited his evidence to the jury after they were charged to conſider of their verdict.
Poſt. 411. 616.
2. Ro. 261. 715.
Moor, 452.
Co. Lit. 227. b.
Palm. 325.
2. Hale, 307.
Comb. 63.

1. Keb. 36. 2. Keb. 13. 2. Barnes, 352. Salk. 201. 7. Mod. 1. Vent. 97. Stra. 642. 1. Term Rep. 11. 1. Freem. 79. 249. 787. 2. Jones, 83.

Michaelmas

Michaelmas Term,

32. and 33. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Milward *againſt* Clerk.

A promiſe to *the plaintiff* to pay 10 l. in conſideration of being diſcharged from the cuſtody of the ſheriff, is not void by 23. *Hen.* 6. c. 10.

10. Co. 99. b. 1. Salk. 28. Cowper, 128. 1. Term Rep. 418. in point. 2. T. Rep. 569. Ante, 178. Poſt. 200.

ASSUMPSIT. And declareth, that whereas the defendant was arreſted at his ſuit upon proceſs, the defendant, in conſideration that he ſhould be permitted to go at large, and that the plaintiff would give his warrant to the bailiff who arreſted him, to ſuffer him to go at large, that he would appear at the day of the return of the proceſs, or would give him ten pounds; and alledged *in facto*, that he conſented that he ſhould be permitted to go at large, and gave warrant to the bailiff, &c. and that he did not appear at the day, for which he brought action for the ten pounds. Upon *non aſſumpſit*, it was found for the plaintiff.—GODFREY moved in arreſt of judgment, that this was a void *aſſumpſit*, againſt the 23. *Hen.* 6. c. 10. for it is to ſuffer him to go at large contrary to that ſtatute.—GAWDY and CLENCH, *Juſtices*. It is a good *aſſumpſit*, being made to the party who had authority to diſpenſe with his appearance; but if the promiſe had been made to the ſheriff, or to any other to his uſe, it had been within the equity of the ſtatute.—FENNER doubted. But afterwards judgment was commanded to be entered, if other matter be not ſhewn.

CASE 2.

Parker *againſt* Plummer.

A deviſe of the "*iſſues and* "*profits*" of land, paſſes *the land itſelf.* Poſt. 252.

Moor, 635. 8. Co. 95. b. Co. Lit. 4. b. Plowd. 341. 1. Saund. 186. Cro. Jac. 104. 5. Mod. 63. 101. 3. Bac. Ab. 410. 1. Salk 228. 2. T. Rep. 105.

YELVERTON, *ſerjeant*, demanded the opinion of THE COURT. *Parker* having a term for ſeventy years, deviſed that his eldeſt ſon ſhould have the uſe and profit of it for three years, and that afterwards his youngeſt ſon ſhould have his leaſe and term, "ſaving that I will that my wife ſhall have half the *iſſues and pro-* "*fits* of the land during her life, bearing and allowing half the "charges thereof." The queſtion was, If the wife had any intereſt in it, or only to have an account for the profits of the land received?—GAWDY and CLENCH. She hath an intereſt in the land; for to have the iſſues and profits, and to have the land, is all one; and ſo was the intent that ſhe ſhould have the land with the ſon for her life; and if ſhe hath no intereſt, ſhe can have no action; for account lieth not for want of privity.

Tibbot

Tibbott *againſt* Haynes.

CASE 3.

Eaſter Term, 32. Eliz. Roll 353.

ACTION for theſe words: "*Tibbott* and one *Gough* agreed to "have hired a man to kill me, and that *Gough* ſhould ſhew "me to the hired man to kill me." Upon not guilty, it was found for the plaintiff.—It was moved in arreſt of judgment, that an action lieth not for theſe words.—And ſo held GAWDY, for it is not alledged that any act was done by the plaintiff, nor any thing put in ure by him; but only a communication between him and *Gough*; but otherwiſe it is, if the words had been, "He hath "hired a man to kill me."—FENNER *contra*; for it is an ill part, for which he might be bound to his good behaviour.—WRAY was abſent; but afterward being preſent, he agreed with FENNER: and judgment was given for the plaintiff, againſt the opinion of GAWDY.

It is ſlander to charge another with *an intent* to do an unlawful act.

Ante, 6.

Cro. Jac. 56. 2. Lev. 205. 1. Ven. 323. 1. Sera. 195.

Weſtbourne *againſt* Mordant.

CASE 4.

ACTION upon the caſe. And declareth, that whereas he was poſſeſſed of a meadow called *Parſonage Meadow* in *W.* adjoining to a little brook there, from the 20th *Aprilis*, 31. *Eliz.* and *adhuc inde poſſeſſionatus*, the defendant the ſaid 20th *April* put in divers loads of ſtone into the ſaid brook, and by it *obſtupavit aquam illam*, that it from the ſaid 20th *Ap.* to the day of the writ purchaſed, overflowed his meadow, ſo that he could not have any benefit of it.—And after verdict found for the plaintiff, it was moved in arreſt of judgment, becauſe the nuſance is ſuppoſed to be done before the plaintiff's title did commence, ſo no cauſe of action.—GAWDY. The declaration is good; for an action of the caſe declareth the whole matter, ſo that it is not material *when* the nuſance was erected, for he that is hurt by it ſhall have an action. FENNER agreed, it may be the nuſance was not by the ſtopping till the running of the water, and the action being brought as the truth is, is well brought. And WRAY being abſent, they commanded judgment to be entered, if nothing ſaid to the contrary.

A declaration in caſe for a continuing nuſance, need not ſtate when the cauſe of the firſt nuſance was erected.

Poſt. 109. 403. 2. R. Abr. 142. 5. Co. 101. a. 1. Leon 273. 1. Vent. 237. Skin. 389. Ld. Ray. 1568.

Sir William Waldegrave *againſt* Ralph Agas.

CASE 5.

Michaelmas Term, 31. *Eliz. Roll* 712.

ACTION for words. And declareth, that he was ſheriff of *Suffolk*, a deputy lieutenant there, and captain of ſix hundred ſoldiers for the ſafeguard of the queen's perſon; that the defendant *præmiſſorum non ignarus*, and of purpoſe to draw him into diſcredit, ſpake theſe words to one *Edward Hill*, who *adtunc fuit et adhuc* is his ſervant: "It is well known that I am a true ſubject, but "thou ſerveſt no true ſubject," *innuendo prædict. Willielmum Waldegrave*, "and that thy own conſcience doth accuſe thee "therefore." Upon not guilty pleaded, it was found for the plaintiff; and damages five hundred pound.

It was alledged by LEWIS, in arreſt of judgment, that an action lieth not for theſe words, for he ſaith not that *Sir W. W.* is no true ſubject. Although the plaintiff ſaith *innuendo the plaintiff*,

The ſlanderous quality of words muſt be judged of by relation to the perſon of whom they are ſpoken: and in an action for words it ſhall be intended after verdict that they were ſpoken of the plaintiff, if it was ſo averred by the *innuendo*.

Poſt. 230. 268. 308. 1. R. Abr. 75.

theſe

theſe are not the words of the defendant, for perhaps *E. H.* did not ſerve any man, or his intent may be otherwiſe: and if they be intended of the plaintiff, yet they are not ſuch words of diſcredit as for which action lay; for it ſhall not be intended that he called him traitor or rebel, but that peradventure he was diſobedient to ſome proceſs, or that he was accountant and made no true account; and cited *Stanhope v. Blith* (a) and *Kimzey's Caſe*. He being a bailiff brought an action for theſe words, "Thou doſt "ſerve falſe warrants, and deceiveſt the people;" adjudged that the words were not actionable; for it is not averred by it that he made falſe warrants, or knew they were falſe. And in the caſe of the clerk of the peace for *Glouceſter*, "You make falſe records, and "juſtify them for true," no action lay; for they might be falſe for miſ-writing or otherwiſe. And in *Savage and Cook's Caſe, circa* 27. *Eliz.* adjudged that theſe words, "Thou art a papiſt, and not "the queen's friend," are not actionable. And the *innuendo* cannot aid the matter, nor the averment that he was his ſervant will not ſerve; as it was adjudged in the caſe of *George v. Parker* for theſe words, "Thou haſt broken my ſhop, and taken my goods," *innuendo*, "*that he had robbed him of them;*" an action did not lie; for the firſt words were not actionable, and the ſecond could not aid them.—GODFREY *contra*. And he agreed the caſe of *Kimzey*, and of the clerk of the peace of the county of *Glouceſter*, for he was of counſel in them; for they ſhall be intended in a good ſenſe, and could not be intended that they counterfeited warrants, or records: but here it ſhall be intended in *malam partem*, that he is no true ſubject, but a traitor to the queen.—Upon another day it was moved again: and EGERTON, *Sollicitor*, urged, that theſe words being ſpoken of a man of ſuch credit as the plaintiff, are to be more regarded than if ſpoken of a private man; and it is a rule in the civil law, "*Sermo relatus ad perſonam debet intelligi ſecun-*"*dum conditionem perſonæ*;" and he cited the caſe of *Mr. Edward Boughton v. the biſhop of Coventry and Litchfield*, which was for theſe words, "He is a vermin in the commonwealth, and a corrupt "man;" and for that he was a juſtice of peace, and a man of good eſtimation, it was adjudged, after long arguments, that he ſhould recover, and had four hundred marks damages.—Afterwards it was moved again by COKE *for the plaintiff*, that the perſon of whom the words were ſpoken being conſidered would bear an action; and cited *Birchly's Caſe* (c), when words are ſpoken which touch one in his duty or courſe of life. And theſe actions are for the diſcredit, and therefore ought to be adjudged according to the credit and place of the perſon of whom they were ſpoken. And *Trinity*, 2. *Hen.* 8. an action was brought by *the biſhop of Wincheſter* for theſe words, "My lord of *Wineheſter* took me and impriſoned "me till I entered into a bond of twenty pounds to the king's "uſe;" adjudged actionable. And *Hilary*, 19. *Eliz. Rot.* 484. *Lord Abergavenny* brought an action for theſe words, "My lord of *Ab.* "ſent for us, and put ſome of us into the ſtocks; ſent ſome of us "unto the gaol, and put ſome of us into the houſe called Little Eaſe;" and adjudged actionable: but ſuch words as in the two laſt caſes ſpoken of a private perſon were not actionable.—WRAY, C. J. The words themſelves for the generality of them may have a good conſtruction and reaſonable intendment, and are not actionable; but the quality of the perſon of whom they are ſpoken being conſidered

(a) Co. 4. 15. a. b.

(c) Co. 4. 16. a.

fidered, he being touched in his credit, and courſe of life, they are actionable: as to call a biſhop "papiſt," is actionable; ſo to call a judge "a corrupt man;" for they concern them in their office; but to call a private man ſo is not actionable. And whereas it was ſaid, that it appeareth not they were ſpoken of the plaintiff, but that it may be intended *E. H.* did not ſerve any man; as to that, the *innuendo* takes away all uncertainty in that; for ſo it is in all actions upon the caſe for words, the *innuendo* makes them ſpoken of the plaintiff, and the defendant is found guilty; and ſo is eſtopped to ſay, he did not ſpeak them of the plaintiff.—GAWDY. For the certainty of the perſon, there is no doubt but that the *innuendo* makes them as certain as if he had ſaid, "*Sir William Walgrave is no true ſubject*;" but for the generality of the words he doubted, and deſired to ſee *Bucklie's Caſe*. But as to the words "true ſubject" he ſaid, they could not have any other reference than that he was not true in his allegiance, or in his ſubjection, and cannot be intended falſe in other matters of account, &c.—Becauſe FENNER was not ſatisfied, they would adviſe till another term; and the next term it was adjudged for the plaintiff.

WALDEGRAVE *againſt* AGAS.

Poſt. 230. 268. Cro. Jac 202.

Taſſall *againſt* Shane.

Trinity Term, 32. *Eliz.* *Roll* 828.

CASE 6.

DEBT ON BOND. The condition was to pay 11 l. upon the 12th of *Feb.* Defendant pleads an accord 8th *Feb.* that if he paid 8 l. upon the ſaid 12th of *Feb.* that he would accept it for the payment of the 11 l. and pleads a tender at the day, *et encore priſt.* This being but a concord, which is no plea in debt without ſatisfaction, it was adjudged for the plaintiff (*a*).

An accord to pay a leſs ſum cannot be pleaded in ſatisfaction.

9. Co. 79. a. 5. Co. 117. b. 2. Salk. 627.

1. Rol. 12. 9. Cro. Car. 193. Ray. 203. 1. Leon. 19.

(*a*) An agreement between a debtor and his creditors, that they will accept a compoſition in ſatisfaction of their reſpective debts, to be paid in a reaſonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. 2. Term Rep. 24.

Thomas Dearing's Caſe.

CASE 7.

HE was indicted of murder.—LEWKENER took divers exceptions.—Firſt, The inquiſition was taken before *Th. G.* coroner of the *Lord Barkley*, but ſheweth not that he was coroner of the county, or of what liberty.—Second, It is not ſhewn how the *Lord Barkley* can make a coroner, by patent or preſcription.—Third, It is, *quòd percuſſit cum gladio*, and ſaith not *felonicè*.—And for theſe cauſes the indictment was diſcharged.

An indictment quaſhed for want of *felonice*, &c.

4. Co. 41. 5. Co. 121. 2. Hawk. 320. 359.

Tho. Greenleaf *againſt* Jo. Barker.

CASE 8.

ERROR of a judgment given in an *aſſumpſit* at *Canterbury*.—Firſt error. That whereas the ſaid *Jo. Barker* brought an *aſſumpſit*, and declared, that whereas the ſaid *Jo. Barker* was indebted to the ſaid *Thomas Greenleaf* by obligation in 5 l. to be paid on the 1ſt *Nov.* following, in conſideration that he the 3d *Nov.* at the inſtance and requeſt of the plaintiff, would pay him the ſaid 5 l. without ſuit or trouble; he aſſumed to deliver him a bond, in which *J. S.* was indebted to him in 20s. with a letter of attorney to ſue for the debt. Upon this declaration, after verdict, judgment was given for the plaintiff; and upon this judgment error was brought.

A. is indebted to *B.* in 5 l. on a bond payable 1ſt Nov. *B.* in conſideration that *A.* would pay the bond on 3d Nov. *promiſes* to deliver to *A.* the bond of *C.* for 20s. with a letter of attorney to ſue for it. *Quære*, if an *aſſumpſit* will lie on this conſideration?

FIRST ERROR. The conſideration was not good, for he did no more than the law did compel him to do, *viz.* to pay the money that

GREENLEAF *against* BARKER.

that was due before.—And ſo was the opinion of GAWDY and FENNER, *Juſtices*, for he payeth no more than was due; but if it had been paid before the day, it is otherwiſe: for every conſideration muſt be for the benefit of the defendant, or ſome other at his requeſt, or a thing done by the plaintiff, for which he laboureth, or hath prejudice; as 37. *Hen.* 6. to cure one; and 20. *Eliz.* in the common pleas, *Worthington v. Sydenham*, in an *aſſumpſit*, that whereas he was bail in the queen's bench for *J. S.* ſervant of the defendant, he ſuch a day aſſumed to ſave him harmleſs; but it not being alledged, that it was at the time of the bail or before, nor at his requeſt, but after it without conſideration, it was void. 9. *Edw.* 4. concord to deliver one his own writings, is void.

Ante, 42. Dyer, 356. pl. 39. 1. Roll. Abr. 128. pl. 4. 1. Cro. 409. Plowd. 5. f.

SECOND ERROR. The *aſſumpſit* is void; for it appeareth not the plaintiff could have any benefit of it; for it is not to ſue and recover the 20s. to his own uſe, and ſo is rather a charge.—And of that opinion was GAWDY.—FENNER *contra*.

THIRD ERROR. For that upon the *venire facias* only *twenty-three* were returned, whereas there are to be twenty-four.—GAWDY. It is helped by the ſtatute of *jeofails*, after verdict.—FENNER doubted (*a*). But both conceiving there was no conſideration, and ſo a plain error (WRAY *abſente*) they were both of opinion to reverſe the judgment.—TANFIELD, who was not of counſel in the caſe, ſaid it was adjudged *Paſch.* 23. *Eliz. inter Coke et Hewit*, that in conſideration he would, at the requeſt and inſtance of the plaintiff, pay him twenty pounds upon a bond at the day when it was due, he aſſumed to deliver to him the bond: this was adjudged a good conſideration.—GAWDY. That may be, for it is to deliver to him the ſame bond which was to be delivered upon the payment of the money; but here it is collateral: and they would adviſe.

(*a*) Poſt. 586. 5. Co. 36. Cro. Jac. 647. Cro. Car. 223. 278. 1. Brownl. 274. Latch. 57.

CASE 9.

Rigg *againſt* Clarke.

A declaration in caſe for *over-burthening* the plaintiff's horſe held ill after verdict, becauſe it did not ſtate *how* the horſe was over-burthened.

ERROR of a judgment in an action upon the caſe, where *Clarke* did declare, that whereas he was poſſeſſed of a gelding, in conſideration that he would lend his gelding to *B.* to carry three buſhels of coals from *Ware* to the houſe of *B.* he promiſed he would not *aliter eum onerare*; and alledges, that the ſaid *B. aliter per viam prædict' onerabat ſpadonem prædict' et magis penderoſius onus ſuper ſpadonem prædict' impoſuit.* Upon *non aſſumpſit*, and found for the plaintiff, judgment was given, and error brought.—Firſt error. He ſaith, *per viam prædict'*, whereas it ſhould be *in viâ*. But this was clearly diſallowed; for it is all one, and of one ſenſe.—Second error. That it is alledged, *aliter onerabat*, and ſheweth not how. GAWDY and FENNER held clearly it was error: for to enable him to the ſuit, he ought to ſhew how he over-burthened him.—And being moved again, it was adjudged, that for this cauſe the judgment ſhall be reverſed; although GODFREY moved ſtrongly that it was well enough; for it lay not in the conuſance of the plaintiff how he did over-load him; nor is it material, how he did over-load him. For if he alledged in one manner, and it be found in another manner, it is found for the plaintiff; and this is after verdict. And although the declaration is faulty in form, this is aided by 18. *Eliz.* c. 16. But notwithſtanding theſe reaſons, the judgment was reverſed; for it is a thing material which the plaintiff is to ſhew.

2. Saund. 319.

Kinnerſly *againſt* Smart.

CASE 10.

Trinity Term, 32. Eliz. Roll 898.

DEBT upon an obligation. The defendant pleads, that at *W.* in the county of *Warwick*, there was a communication and agreement between them for lending of money; and that the plaintiff ſhould have ſo many oxen which were of ſuch value above ten pounds *per annum*; and for the performance of this uſurious contract, the bond was made, and pleads the ſtatute of 13. *Eliz.* to avoid the bond. The plaintiff ſaith, that it was well and duly made upon good conſideration, ABSQUE HOC that it was made for ſuch uſurious contract; and upon this they were at iſſue, and tried in the county of *Warwick*; and found for the plaintiff.

On a plea of uſury to an action of debt on a bond, the trial ſhall be where the uſury is alledged, and not where the bond was made. Poſt. 870. 1. Leon. 206.

TANFIELD. This iſſue is miſ-tried, for it ſhould be tried in *London*; for the iſſue is, that the bond was not made upon an uſurious contract; and the bond was ſuppoſed to be made at *London*; and the bond being made there, the trial is to be there.

COKE and KENNERSLEY *contra*. For the bond is confeſſed; but the point is, If it were made by uſury, which is alledged to be at *W.* in the county of *Warwick*; and upon this is the iſſue taken. 8. *Edw.* 3. *pl.* 8. An iſſue being, if a deed were made by *dureſs*, the iſſue ſhall be tried by a *venire* of the place where the *dureſs* is ſuppoſed, and not where the deed is ſuppoſed to be made. 22. *Edw.* 3. *pl.* 15. 25. *Hen.* 6. *pl.* 24. *Hill.* 28. *Eliz. Rot.* 311. *vel* 211. in *Sibthorpe et Turnor*, this exception was taken and ruled, that the trial ſhall be in the county of *Eſſex*, where the uſury was ſuppoſed to be, and not at *London*, where the deed is ſuppoſed to be made. And *Paſch.* 32. *Eliz. Rot.* 303. the like rule in *Pay and Wilkinſon*. —And this being moved divers days this term, upon the laſt day of the term the plaintiff had judgment.

Parcel's Caſe.

CASE 11.

HE was indicted, that at ſuch a day, and divers days before and after, he was a common barretor, *et perturbator pacis*; but ſhewed no place where, nor cauſe for which he is a common barretor; and theſe exceptions were taken by LEWKENER.—But THE COURT held it good, without any ſpecial cauſe ſhewn; and the place is not material, for it is in every place; and the trial ſhall be *de corpore comitatûs*.

An indictment for barretry need not ſhew *the place* or the cauſe of the offence. 2. Keb. 410. Latch. 194. *cont.* Palm. 450. 1. Term Rep. 748.

Wilſon *againſt* Jeffery.

CASE 12.

Eaſter Term, 30. Eliz. Roll 219.

ERROR of a judgment given in a writ of covenant.—And the principal error aſſigned was, that the plaintiff declared upon an indenture in this manner, *quòd cum per ſcriptum indentatum factum inter eos teſtatum fuit, &c.* and doth not alledge *in facto*, that he by ſuch an indenture did covenant.—FENNER. So is the common courſe in declarations; but in a plea in bar it is no good form. And all the prothonotaries of the common pleas certified, that ſo are all their precedents; and LOE, and other clerks of the queen's bench ſaid, ſo is their courſe.—And the judgment was affirmed.

A declaration in covenant need not alledge that the plaintiff did by the indenture covenant, &c. 2. Roll. Rep. 210. 1. Sid. 375. 1. Saund. 274. Cro. Car. 188. Dougl. 667. 767.

Cro. Jac. 383. 537. 1. Bac. Abr. 545. in notis. Cowp. 665.

CASE 13.

Katherine Hume *againſt* Luke Ogle.

If an indictment alledges the murder to be where the mortal wound was given, and that the death happened at a different place, it is repugnant; and the defendant may demur after iſſue joined.

Fitz. Cor. 12. Dyer, 38. 1. Salk. 59. 2. Hale, 188. 3. Sid. 208 3. Hawk. 182. 265. 268. 471. 30. Mod. 86. 11. Mod. 216. 230. 254. Holt, 355. 2. Ld. Ray. 1288.

APPEAL of the death of her huſband. And declares, that the defendant, ſuch a day, at *Weſt-Lilburne* in the ſaid county, gave him a mortal wound, of which, at *Wetwood* in the ſaid county, he languiſhed, and the ſame day there died; and ſo the ſaid defendant, the ſame day and year, at *Weſt-Lilburne* aforeſaid, her ſaid huſband *modo et formâ prædict' murdravit*. And although not guilty pleaded, and iſſue joined upon it, yet he waived it, and demurred upon the declaration (as it was clearly held by THE COURT he might). For if the declaration be not good, it is in vain to proceed to a trial; yet it was clearly held, that it is not peremptory to the defendant; for if it be adjudged againſt him, it is but a *reſpondes ouſter*. And the cauſe of the demurrer was, that the death is ſuppoſed to be at *Wetwood*, and yet the murder is ſuppoſed to be at *Weſt-Lilburne*, which is contrary, and cannot be; for although the ſtroke is ſuppoſed to be at *Weſt-Lilburne*, yet it is not felony till his death, which was at *Wetwood*, and there the murder is ſuppoſed to be done: and the caſe of *Heyden*, 4. *Co.* 41. was cited. And as the indictment there was inſufficient for the time, ſo here for the place, which is moſe material; for from this the *venire* ſhall come; but if it had been, *et ſic murdravit modo et formâ prædictâ*, it had been good.—And IVE ſaid, divers of the ancient precedents are, that the murder is ſuppoſed to be where the *ſtroke* was.—But THE JUSTICES held clearly, that the indictment was ill; for of neceſſity it muſt be at the place of his death. And although the precedents are ſo, yet they did paſs *ſub ſilentio*, and were not well examined, and not to be regarded, as *Heyden's Caſe*: and it was reſolved, that there was no difference between the caſes; and adjudged, that the appeal did abate.

CASE 14.

Sir Gilbert Gerrard, Maſter of the Rolls, *againſt* Mary Dickenſon.

Faſter Term, 31. *Eliz.* *Roll* 453.

What words will amount to ſlander of a man's title.

S.C. 4. Co. 18. 4.

(a) Yelv. 89. Cro. Car. 140. Cro. Jac. 397. 1. Roll. Rep. 24 2. Bulſt. 75. Poll. 529.

ACTION UPON THE CASE, *for ſlandering his title*. And declared, that whereas he was ſeiſed of the manor of *Hely*, in the county of, &c. and *Sir Ralph Egerton* was in ſpeech with him (*a*) to have a leaſe of it for years, and offered ſo much for the rent, and ſo much for a fine; the defendant, *præmiſſorum non ignara*, but intending to ſlander his title, ſaid in the preſence of divers, "I have a leaſe of the manor of *Hely* for ninety-nine "years;" and publiſhed a deed of leaſe to divers, affirming it to be good, and offered to ſell it, and all her intereſt in it; *ubi revera* the defendant did know it to be a forged deed: and by reaſon of theſe words *Sir Ralph Egerton* would not take a leaſe; nor any other; by which he loſt the commodity of his land, to his damages of one thouſand pound.—The defendant pleaded, that one *W. Dickenſon*, her huſband, died at *Uxbridge*, &c. after whoſe deceaſe *talis indentura qualis in narratione prædict' ſpecificatur, et quoddam ſcriptum exemplificationis hujuſmodi talis indenturæ ſub magno ſigillo Angliæ ſigillat'*, came to the poſſeſſion of the defendant amongſt other writings; the which the defendant then and there did believe to be a good leaſe, and duly made, ſealed and delivered; for which ſhe doth juſtify the words, ABSQUE HOC that ſhe did know it to

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be a deed of a forged leaſe.—Upon this it was demurred in law, and argued by COKE and WARBERTON *for the plaintiff*; and by ALTHAM and SNAGG, *ſerjeants, for the defendant*.—As to the bar, it was held clearly by THE JUSTICES, and in manner confeſſed by the defendant's counſel, that it was ill, for ſhe ſaith, *talis indentura qualis, &c.* ſo doth not anſwer to the deed in the declaration, for *talis* is not *eadem* (*b*). But as to the ſubſtance of the declaration, it was moved, that the action did not lie; for the defendant ſaith ſhe had a leaſe, which is not to be referred to the deed of leaſe, but to the intereſt of the leaſe; and when ſhe claimeth an intereſt, ſhe is not puniſhable (*c*), and the caſes of conſpiracy, 22. *Edw.* 3. *pl.* 1. & 40. *Edw.* 3 *pl.* 19. and the caſes of publiſhing of forged deeds, 9. *Hen.* 6. *pl.* 26. 26. *Hen.* 6. *pl.* 11. 10. *Hen.* 7. *pl.* 29. 15. *Edw.* 4. *pl.* 25. were cited, that the party is not puniſhable claiming an intereſt, or not knowing it to be forged.—And divers exceptions were taken to the declaration.—Firſt, It is not averred that the defendant had not title.—Second, It is ſaid, ſhe offered to ſell, but ſaith not to whom; ſo incertain.—Third, That ſhe publiſhed *diverſis perſonis*, but ſhewed not to whom.—Fourth, It is ſaid, that ſhe knowing it to be forged publiſhed it; and no place ſhewn of her knowing, which is material and traverſable; and ſo a place ought of neceſſity to be inſerted.—*Sed non allocatur*. As to the matter, it was ſaid it was ſufficient to entitle the plaintiff to an action; for if one entitle a ſtranger to my land, and not himſelf, an action lieth. *Trin.* 24. *Eliz. Johnſon v. Smith*, the caſe was, *Johnſon* enters into a communication with *Sir H. Bedingfield* to ſell him certain land, and the defendant knowing it, ſaid in the country, that a ſtranger had a rent-charge out of it; by reaſon whereof *Sir H. Bedingfield* refuſed to proceed in the bargain; and *Mildmay v. Stanfield* was cited (*d*). So here, when ſhe deriveth no title to herſelf, but in effect ſaith her huſband had a leaſe, which now is a ſtranger, an action lieth not.—WRAY, *Chief Juſtice*. The words "I have a leaſe, &c." ſhall not be conſtrued that ſhe had a *term* or *intereſt* in the leaſe itſelf, but only an indenture of leaſe; and is as much as if ſhe had ſaid, that ſhe had an indenture of leaſe made to her huſband in her keeping, ſo makes no title to herſelf; and being ſo, all will agree ſhe is puniſhable. But if ſhe had ſaid, that ſhe had an intereſt or term for ninety-nine years, and entitled herſelf to it, it were otherwiſe. But in all caſes, when one doth entitle a ſtranger, it is not actionable, except it be ſhewn that ſome damage cometh to the proprietor by it, *viz.* that he cannot let it or ſell it, &c. (*e*) And that an action lieth not where one doth entitle himſelf, the caſe of 17. *Edw.* 4. *pl.* 3. doth prove it. For if one ſaith *J. S.* is his villein, an action lieth not; but if he ſaith, "*J. S.* is villein to a ſtranger," it is otherwiſe.—GAWDY, *Juſtice*. The ſaying "I have a leaſe" amounts to as much as I have *an intereſt* for years, for ſo it is intended in common parlance; and ſhe doth not only ſay ſhe hath a leaſe, but this is enforced by offering to ſell it: but it being alledged that ſhe publiſhed it knowing it to be forged, and ſo doth endamage the plaintiff, and of purpoſe to ſtop him to let, &c. it ſeemeth the action is maintainable. At common law, if one ſue a *forged* obligation knowing it to be ſo, an action of the caſe lay (*f*) And although ſhe claimeth a leaſe to herſelf, yet ſhe publiſhing it knowing it to be forged, an action lieth: and although it is ſaid, that it is not

(*b*) Doc. Plac. 58. Lane, 62. 4. Co. 18. b.

(*c*) 1. Roll. Rep. 409. 1. Sid. 79. Cro. Jac. 164. 213. Moor, 188. Heb. 205. Hetl. 161.

(*d*) Ante, 34. 1. Co. 177. Moor, 144.

Poſt. 417.

(*e*) Cro. Car. 140. Yelv. 88. Co. 4. 18. a.

(*f*) Hob. 267. Fitzg. 98. 174. Poſt. 836. Co. 4. 18. b.

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not publiſhed as a true deed, but *quaſi verum*, this is a plain affirmative that it was true.—Afterwards the plaintiff had judgment.

CASE 15.

John Hooper's Caſe.

The addition muſt be placed before the *alias dictus*; but the addition "*wife*" in an indictment againſt a *feme-covert* is ſufficient. Poſt. 249. 583.

JOHN HOOPER, *alias* BARTHOLOMEW, *carpenter*, and others, were indicted upon the 8. *Hen.* 6. c. 9.—And becauſe the addition came after the *alias*, it was held void as to him, and the indictment diſcharged.—In the ſame indictment, one was indicted by the name of *J.* the wife of *J. S.* of *D.* and it was moved, If this were good without any other addition to the wife, of her myſtery, or place of her habitation?—GAWDY held it was not.—CLENCH and FENNER *contra*.

2. Inſt. 669. Theol. b. 6. c. 14. f. 19. Moor, 354. 2. Leon. 183. 5. Edw. 4. pl. 41. *con.* 2. Hale, 177.* Co. Lit. 3. a. 2. Inſt. 669. 1. Com. Dig. 33. F. 24.

CASE 16.

Edward Walwin's Caſe.

Outlawry reverſed. Ante, 85.

ERROR brought by him to reverſe an outlawry upon an indictment of murder.—The error was, that in the indictment he was named *Edward Walwyn de Mackre*, and the *capias* was *de Mackreo*; and by the name of *Walweene*, whereas his name was *Walwin*: and for theſe cauſes the outlawry was reverſed.

CASE 17.

Berkenhead *againſt* Nuthall.

Variance in the ſum demanded between the writ and the declaration *in debt* is fatal.

ERROR upon a judgment in debt.—Error was, that in the writ he demanded one hundred and ſixty-ſix pounds thirteen ſhillings and fourpence, and in the declaration he demanded one hundred and ſeventy-one pounds ten ſhillings: and for this variance the judgment was reverſed.

Poſt. 185. 2. Wilſ. 394. 2. Salk. 701. 6. Mod. 303. Cowp. 178.

CASE 18.

The Archbiſhop of York *againſt* Sir Henry Barkly.

Variance.

Cowp. 229.

ERROR upon a judgment in a *quare impedit*.—Variance was aſſigned between the record and the writ; for one was of the church of *Bonnington* with a double *nn*, and the other was *Bonington* with a ſingle *n*; and TANFIELD compared it to the caſe of attaint which was overthrown, becauſe one record was *York*, and the other *Yerk*: but *inter Colceſter et Colcheſter*, in *Bird and Shelberie's Caſe*, (*Vide antea*, 172.) it was held to be no difference, becauſe *h non eſt litera, ſed aſpiratio*.—Another variance, becauſe the judgment was ſuppoſed to be given before LORD ANDERSON, and his companions; whereas it was before LORD DYER, &c.—And this was held a great variance, and it was commanded to be examined, &c.

CASE 19.

Leverett *againſt* Townſend.

Either *caſe*, or *aſſiſe*, may be brought for diſturbance of common, as by plowing it. Ante, 191. Poſt. 466. 9. Co. 112. b. 1. Com. Dig. 199. 215. 3. Bl. Com. 240.

ACTION upon the caſe. And declareth, that whereas he was ſeiſed of ſixteen acres of land in *D.* and by reaſon of it had after harveſt ſevered common in another parcel of land of twenty acres adjoining there every year, the defendant had plowed this land, by which he was diſturbed of his common.—After verdict, it was alledged in arreſt of judgment, that he having a freehold in the land, to which he claimed common, he was to have an aſſiſe, and not an *action* upon the caſe. 2. *Hen.* 4. *pl.* 11. 8. *Eliz. Dyer*, 258.—But THE COURT, and COKE, who was of counſel of the

4. Burr. 2426.

same part, held he might have one action or the other. But COKE said it was not expressed when the disturbance was made, and so might be before harvest, and then no cause of action.—GAWDY and FENNER held it well enough; for the disturbance was by plowing up the land, which was a nusance, and would remain so always: but they would advise.

LEVERETT *against* TOWNSEND.

Warter *against* Perry and Spring.

CASE 20.

SCIRE FACIAS against them, as mainpernors of *Broke*. They pleaded that *B.* was dead the day of the judgment given.—THE COURT at first held it no plea; for it goeth in avoiding the judgment, and proveth it to be erroneous, which cannot be avoided but by error. But they might plead the death of *Broke* before the *scire facias*, and after judgment; for then they could not bring in the body.—But afterward the plea was received, because they cannot have a writ of error to reverse the judgment (*a*).

To a *scire facias* the bail may plead that the principal died before judgment was signed. Ante, 185. 1. Roll. Abr. 449. 742.

1. Leon. 101. 2. Mod. 308. 2. Bac. Abr. 189. Dougl. 58. 2. Term Rep. 576.

(*a*) See 17. Car. 2. c. 8. and 8. & 9. W. 3. c. 11. s. 6.

Veal *against* Roberts.

Trinity Term, 32. Eliz. Roll 676.

CASE 21.

EJECTIONE FIRMÆ. The case was, *Stevens* was seised of two customary messuages and lands to the same belonging, and *Heydon* was seised of two other customary messuages and lands to the same belonging; and *W.* and *W.* were possessed of certain lands containing ten acres, called *Normors* (which were the land in question); all which were parcel of the possessions of the abbey of *Glouceſter*. The abbot and convent let to *John Veal* "the said "four messuages and lands, *necnon* the said lands called *Normors*, "*habendum et tenendum* the said messuages and lands, &c. *necnon* "the said ten acres of land, *à tempore mortis ſurſum redditionis*, "*forisfacturæ aut determinationis ſtatûs et termini prædict*' of *Stevens*, "*Heydon*, *W.* and *W.* for years, rendering rent." The estate for years in *Normors* expired; the other estates of *Stevens* and *Heydon* were in being. The question was, If the lease should commence for *Normors*?—JOHNSON and SNAGG argued it should not, till all the estates were determined; for otherwise there should be a great inconvenience for the apportioning of the rent; and if a lease be made to commence after the death of *J. S.* and *J. D.* it shall not commence till both be dead.—COVENTRY and COKE *è contra*; and relied upon *Juſtice Wyndham's Caſe*, 5. *Co.* 7. 8. b. and *Pollard's Caſe* there cited.—GAWDY and FENNER, *Juſtices*, held clearly it should commence presently for *Normors*; and GAWDY relied upon *Adams v. Wroteſlies* (*a*), that a term in reversion shall commence not when the term is run out in time only, but also when it is expired *per ſurrender*, or other means.—And FENNER said, the case is stronger than *Wyndham's Caſe*; for here are several *habendums*, by reason of the word *necnon*.—Afterward, WRAY being present, it was adjudged accordingly.

A lease in reversion of *ſeveral* parcels of land, made to commence on the happening of *ſeveral* contingencies, shall take effect and commence respectively as those contingencies happen. 1. Saund. 182. 2. Leon. 105. 3. Bac. Abr. 430.

(*a*) Plowd. 119.

Featherston *against* Hutchinson.

CASE 22.

ASSUMPSIT. And declares, That whereas the plaintiff had taken the body of one *H.* in execution at the suit of *J. S.* by virtue of a warrant directed to him as special bailiff; the defendant,

A promise by a third person to pay the sheriff the debt of his prisoner in consideration of his being set at large, is void by 23. Hen. 6. c. 10. Ante, 19. 1. Lut. 596. Yelv. 197. 2. Bulst. 213. Godb. 250. Hetl. 175. 10. Co. 102. 3. Leon. 208. 1. Salk. 23.

FEATHERSTON *againſt* HUTCHINSON.

Cowp. 128. Douglas, 1. Ter. Rep. 419. 2. Ter. Rep. 569.

in conſideration he would permit him to go at large, and of two ſhillings to the defendant paid, &c promiſed to pay the plaintiff all the money in which *H.* was condemned. Upon *non aſſumpſit*, it was found for the plaintiff.—It was moved in arreſt of judgment, that the conſideration is not good, being contrary to the ſtatute of 23. *Hen.* 6. c. 10. and that a promiſe and obligation was all one. And though it be joined with another conſideration of two ſhillings, yet being void and againſt the ſtatute for part, it is void in all. *Vide Dive et Manningham's Caſe, in Comment. f.* 60.

CASE 23.

Wolley, Dean of E. and the Chapter *againſt* Robinſon.

The chapter cannot join in treſpaſs for the poſſeſſions of *the dean.*

TRESPASS. For entering into the cloſe of the dean.—After verdict found for the plaintiffs, it was moved in arreſt of judgment, that this action being brought for the poſſeſſions of the dean only, the chapter was not to join: and for this cauſe judgment was ſtayed.

CASE 24.

Warner *againſt* Young.

In treſpaſs, a juſtification to cut trees for the repair of a meſſuage, by virtue of a leaſe, muſt ſhew where the meſſuage is ſituated.

TRESPASS. For entry into a wood called *Demſil-wood* in *L.* in *Suffolk*.—The defendant pleaded, that the *Duke of Norfolk* was ſeiſed of this wood, and of a meſſuage and of land to the ſame belonging, and let to him the ſaid meſſuage and lands for years by indenture; and by it did covenant, that for the reparation of the houſe and the fencing, he might take trees in the wood; and becauſe part of the houſe was decayed, he took the trees for reparation, &c.—Upon this the plaintiff demurred, becauſe he doth not ſhew the village or place where the meſſuage, &c. was. That if an iſſue was, that the meſſuage was not in decay, no place is known from whence the *venue* ſhould be.—And for this cauſe it was adjudged no good plea, and the plaintiff had judgment.

CASE 25.

Bouche's Caſe.

Indictment for an eſcape held bad for not ſhewing the place where the arreſt was made.

(*a*) Ante, 120.

SUFFOLK. He was indicted, for that he being conſtable of the hundred of *H.* arreſted one for burglary, and after at *D.* in the ſame county he let him eſcape.—And becauſe no place was alledged where the arreſt was made; and if he ſhould plead not guilty, the *venue* ſhould be as well from the place where the arreſt was made, as from the place of the eſcape (*a*); it was held, the indictment was void, and the party was diſcharged.

CASE 26.

Anonymous.

The place from whence the *viſne* ſhall come when the offence is committed in a *foreſt.*

1. Sid. 326. Co. Lit. 125. 2. Roll. Ab. 621. 2. Hawk. 265. Ante, 32.

WILTS. Certain perſons were indicted for entering into the foreſt called *Grovely-foreſt*, and hunting there in a place called *Denſhaw-wood*. The indictment being traverſed, the *venire facias* was awarded *de vicineto de Grovely*; and the jury appearing at the bar was diſcharged. For it was held, where a thing is ſuppoſed to be done in a place which is a village in the foreſt, the *venire facias* ſhall be awarded *de vicineto* of the ſame village. But if it doth not appear that it is a village, then it ſhall be *de vicineto* of the foreſt, as 47. *Edw.* 3. 6. *Hen.* 7. *pl.* 3. & 5. *Hen.* 7. But GAWDY and FENNER ſaid, that if the ſheriff returns, there is no ſuch village or pariſh, the *venire facias* ſhall be awarded *de corpore comitatûs.*

Smith

Smith *againſt* Hitchcock.

CASE 27.

ACTION upon the caſe upon an *indebitatus eſt*, 19. *Novemb.* 32. *Eliz.* The defendant pleads, that he was indebted to the plaintiff in 200 l. 30. *Eliz.* for which he gave him his bond the ſame year; which ſum the plaintiff had recovered againſt him in debt, and had execution, ABSQUE HOC that *adtunc, antea vel poſtea*, he was indebted to the plaintiff *aliter vel alio modo*. Upon this plea it was demurred in law.—PUDSEY and GODFREY argued for the plaintiff, that this is no good plea; for it is but a traverſe of the conſideration, which is not traverſable, but is to be proved upon the general iſſue; and this plea amounts but to a general iſſue: and though this be but matter of form, yet this was alledged ſpecially upon the demurrer; and relied upon the caſe of 8. *Hen.* 6. 34. *Hen.* 6. the caſe of treſpaſs in a warren. And this plea doth anſwer to the *aſſumpſit* but by way of argument, 8. *Hen.* 5. *pl.* 9. 11. *Edw.* 4.—PARTRIDGE *contra*. For this is the ſubſtance and material part of the action; and for that relied upon 12. *Hen.* 4. *pl.* 7. and *Kennerſly v. Cooper*, *Hill.* 32. *Eliz. pl.* 5.—GAWDY, *Juſtice*. In every action where wager of law lieth not, the conveyance to the action, being a thing material, is traverſable; but here, becauſe the conſideration is executed, it is not traverſable, as 5. *Hen.* 7. *pl.* . 21. *Hen.* 7. *pl.* 13.—WRAY, C. J. and FENNER, *Juſt.* The conſideration in an action upon the caſe is material, but not traverſable; as in an action *of trover*, the converſion is material, but not traverſable (*a*).—And it was adjudged for the plaintiff.

In *aſſumpſit*, the conſideration may be traverſed where it is executory; but not where it is executed.

Ante, 169.
Poſt. 250.

5. Mod. 314.
1. Roll. Rep. 43.
Hob. 106.
Cowp. 342.

(*a*) Vide ante, 97. *contra*.

Cullier and Cullier.

CASE 28.

THEY were ſued in the ſpiritual court for incontinency, and the Judges there would examine them upon their oath (*a*), if they did it.—But becauſe *nemo tenetur prodere ſeipſum* in ſuch caſes of defamation, but only in cauſes teſtamentary and matrimonial, where no diſcredit can be to the party by his oath, COKE prayed a prohibition; and it was granted.

The oath *ex officio* cannot be adminiſtered in a libel for incontinency.

Poſt. 262.
Moor, 906.
Cro. Jac. 388.
3. Comm. 447.

(*a*) This oath is aboliſhed in *criminal* matters by 13. Car. 2. c. 12.

Yeoman *againſt* Stenlack.

CASE 29.

ERROR The entry of the warrant of attorney of the defendant was, *ponit loco*, but ſaith no *ſuo*.—But the entry being that the plaintiff *ponit loco ſuo*, and that the defendant *ponit loco ſimiliter*, it is good enough: and the judgment was affirmed.

Entry of the attorney's warrant.

Dougl. 174.

Anonymous.

CASE 30.

IN a bill of perjury, the parties being at iſſue, COKE took exception at the declaration; which was, that the defendant *falsò depoſuit, &c.* but ſaith not *corruptè et voluntariè*; but in the concluſion of the declaration it was, *et ſic falsò, corruptè et voluntariè depoſuit*.—But becauſe it was not alledged at the firſt, when the fact was alledged, the declaration was adjudged inſufficient, and that the plaintiff *nihil capiat per billam*.

In perjury on 5. *Eliz.* it muſt be alledged in the firſt part of the declaration that the defendant depoſed *corruptè et voluntariè*.

Ante, 147.—2. Hawk. 320. 3. Bac. Abr. 100. Rex v. Cox, it was determined by ten Judges, that in perjury on 5. *Eliz.* the word "*wilfully*" is a material deſcription, but in perjury at common law "*wickedly maliciouſly and corruptly*" imply "*wilfully*." See Caſes in Crown Law, p. 65.

CASE 31.

Iſam and Paget *againſt* Hitchcock.

Trinity Term, 32. Eliz. Roll 989.

Defect of parties cannot be pleaded in bar. Poſt. 253. 2. Ld. Raym. 1018 1. Mod. 239.

DEBT upon an obligation. The defendant pleads, that the obligation was made to them and to one *Bellamy*, and that they three had an action of debt depending againſt him; and demanded judgment *ſi actio*. Upon this it was demurred.—And becauſe the obligation made to two, upon which they counted, cannot be intended an obligation made to three; and if it be a plea, it is in abatement of the bill, and not in bar; it was adjudged without argument for the plaintiff.

CASE 32.

Blaby *againſt* Eaſtwigg and Eaſtwigg.

The death of the defendant cannot be pleaded in abatement, or alledged in arreſt of judgment after verdict. 1. Sid. 131.

ACTION ON THE CASE. After verdict, it was alledged in arreſt of judgment, that one of the defendants was dead after the day of *niſi prius*. And becauſe the party had not day to plead it, and the Court is not to take cognizance of ſuch informations, they regarded it not; but gave judgment for the plaintiff.

1. Roll. Abr. 768. Cro. Car. 232. Cro. Jac. 646. 4. Leon. 15.—Sed vide Cro. Car. 509. 1. Com. Dig. 76. 1. Wilſ. 37.

CASE 33.

Thomas *againſt* Ward.

Trinity Term, 32. Eliz. Roll 947.

Quere, If where *one* of the parties to a leaſe agree that *he will do* an act *ſub pœnâ forisfacturæ* his intereſt therein, it ſhall be conſtrued mutually, and thereby form a *condition* inſtead of a *covenant*. Poſt. 385. 1. Roll. Abr. 408. 2. Cro. 398. 1. Leon. 246. 2. Com. Dig. 438. 1. Wood's Con. 272. Dougl. 620.

EJECTIONE FIRMÆ. The plaintiff declared of a leaſe made to him of the manor of *Middleton-Cheney* by *A. B.* and *C.* The defendant doth entitle himſelf by a leaſe of the *biſhop of Rocheſter*, long time before the leſſors of the plaintiff, &c. The plaintiff by replication confeſſed the leaſe, but that it was by indenture; and the defendant by it did covenant, that he ſhould not put out or diſturb any of the tenants of their tenancies inhabiting there within the ſaid manor, doing their duties according to the cuſtom of the manor, *ſub pœnâ forisfacturæ* of his intereſt: and ſheweth, that for that the defendant had ouſted one *Ann Green*, *unam tenentium et inhabitantium ibidem*, of the tenement parcel of the ſaid manor *nuper in poſſeſſione et occupatione dict. A. Green*, for this cauſe the biſhop entered for condition broken, and let it to the leſſors of the plaintiff. And upon this the defendant did demur in law.—And the cauſe alledged was, that this is no *condition*, but only a *covenant*; for they are the words of the leſſee only, and not of the leſſor. But if the words had been, "*it is covenanted* "*between them, &c.*" it had been otherwiſe. 28. *Hen.* 8. *Dyer*, 7.—Upon this difference, HOUGHTON *contra*. Although the words found as the words of the leſſee, yet being by indenture, they are the words of the one and other; and although the words found in covenant, yet the intent of them is to defeat the eſtate, which cannot be by covenant, but by condition. *Browning v. Beeſton* (a). And he cited a caſe to be adjudged between *Hill* and *Lockſon*; where the leſſee covenanted to grind his corn at the mill of the lord, and other covenants; and in the end of the indenture he did covenant to perform all the covenants within the ſame, &c. *ſub pœnâ forisfacturæ*; and for not grinding his corn, &c. the leſſor entered, and adjudged for him: and relied alſo upon 21. *Hen.* 6. *pl.* 51. 32. *Edw.* 3. "*Annuity*" 30. where the words of one in a deed ſhall be conſtrued the words of the other.—And of that opinion were WRAY and GAWDY clearly.

(a) Plowd. 131.

TANFIELD

But TANFIELD moved, though it be a condition, yet the breach is not ſufficiently ſhewn.—Firſt, Becauſe he ſaid, that he ouſted *Ann Green*, one of the tenants and inhabitants there, out of the land *super in poſſeſſione et occupatione A. G.* and it may be, ſhe was tenant at will, or had no lawful eſtate but by diſſeiſin, and it ought to have been *nuper in tenurâ et occupatione A. G.*—Secondly, That he ouſted *A. G. quæ fecit debitum ſuum* before expulſion, which may be ſhe did it at once, and not always, as ſhe ought to do.—Thirdly, It is not ſaid ſhe did her duty according to the cuſtom of the manor, but *quòd fecit debitum*; which may be intended only in doing reverence, and not in doing her duty according to the cuſtom of the manor.—And theſe and other faults were held incurable; and thereupon it was adjudged for the defendant.

THOMAS *againſt* WARD.

The breach of a condition not ſufficiently ſhewn.

Smith *againſt* Bernard.

CASE 34.

DEBT upon an obligation. The defendant pleads outlawry in the plaintiff, and concludes in abatement. The plaintiff pleads *nul tiel record*. The defendant had day to bring in the record, and did fail at the day.—And becauſe it was debt upon obligation, in which outlawry goeth in bar, he failing of the record, the plaintiff had judgment: but otherwiſe it is in debt upon contract; for there the queen ſhall not have it.

Final judgment ſhall be given on a plea commencing in bar, tho' it concludes in abatement.

Co. Lit. 128. b. Dyer, 227.

1. Lev. 312. 1. Vent. 136. Salk. 3. 2. Wilſ. 367. 3. Bac. Abr. 762.

Gunnell *againſt* Bradiſh.

CASE 35.

A VENIRE FACIAS iſſued, bearing date the ſeventh of *July*, and was returnable the ſixth of *July*.—And becauſe this was a judicial proceſs, and may be returnable *de die in diem*, it was held, it may be well amended. And it was ſaid, that it is uſual in the common pleas, if a judicial proceſs bears *teſte* upon Sunday, to amend it.

Proceſs teſted after its return is amendable within 32. *Hen.* 8. c. 30.

Ante, 183. Poſt. 543.

2. Cro. Jac. 162. 442. Noy, 57. 1. Str. 138. 1. Com. Dig. 316. 3. Bac. Abr. 273.

Sir George Fermor *againſt* Brooke.

CASE 36.

ACTION UPON THE CASE, for erecting a bake-houſe in *Toſſiter*. And declares, that whereas time out of mind, &c. there had been a manor called *Toſſiter* in the ſame county; and for the ſame time, there had been a town of *Toſſiter*; and that all the land within the ſaid town of *Toſſiter* had been holden of the ſaid manor, of which he is lord; and that he and all his anceſtors, and all thoſe whoſe eſtate, &c. had uſed to have a bake-houſe, and a baker there, to bake white-bread and horſe-bread for all the inhabitants there, and ſtrangers paſſengers; and that none by the ſaid time, &c. had uſed to have a bake-houſe there, but by their appointment; yet the defendant had erected a bake-houſe there, *ad nocumentum ſuum*. The defendant taketh all by proteſtation, except that he confeſſed, that there is ſuch a town; and pleaded, that at the time when he erected his bake-houſe, that there were three bakers there, and that he was an apprentice to the trade, and that he ſet up the bake-houſe for the benefit of all perſons, as it was lawful for him to do.—And upon this plea the plaintiff demurred; and it was argued by FRANCIS MORGAN *for the plaintiff*, and BUCKLEY *for the defendant*.—And it was adjudged for the plaintiff;

A preſcription that the inhabitants of ſuch a vill in a manor ſhall not *bake* elſwhere than at a particular *bake-houſe* in the ſame town, will be good.

1. Roll. Abr. 559. 8. Co. 125. b. 1. Leon. 142. Ow. 67. *cas.* 1. Strange, 465. 1. Bac. Abr. 675. Cowp. 17. Dougl. 218. 221.

FERMOR *againſt* BROOKE.

plaintiff; for the cuſtom is between the lord and his tenants, which by indenture may have a good and lawful beginning; and peradventure their lands were given to them upon this condition; and it is reaſonable that the lord maintaining a bake-houſe, that for this charge they ſhould have reaſonable recompence. And the plaintiff had judgment. *Vide* 8. *Co.* 125. b.

CASE 37.

Stretton *againſt* Browne.

If *an inhabitant* in his turn refuſe to watch, the conſtable may put him in the ſtocks. Poſt. 287. 375. Lamb. 13. Dalt. c. 104. ſ. 3. 3. Leon. 208. Comb. 243. 2. Hawk. 129. 3. Dougl. on Elect. 41. Cowp. 13.

FALSE IMPRISONMENT. The defendant juſtifieth, that he was conſtable of *B.* and that he appointed the plaintiff to watch there; and becauſe he refuſed, he put him in the ſtocks. And upon this it was demurred.—Firſt, Becauſe the defendant did not ſhew that the plaintiff was an inhabitant there; and he cannot appoint a ſtranger to watch, neither by the ſtatute of *Wincheſter*, 13. *Edw.* 1. c. 4. nor by 5. *Hen.* 4. c. 3.—Secondly, It was moved, the conſtable cannot impriſon one for refuſing to watch, but muſt complain to a juſtice of peace, and he may inflict puniſhment upon the refuſers.—Thirdly, That he ought to ſhew it was the plaintiff's turn to watch.—CURIA. For the firſt cauſe clearly, the plea is not good But for the ſecond, WRAY, C. J. held, that the conſtable might impriſon one for refuſing to watch. —GAWDY *contra*.—And for the firſt cauſe it was adjudged for the plaintiff.

CASE 38.

Bradley *againſt* Whorewood.

Variance. 1. Roll. Abr. 199.

REPLEVIN. In the writ the defendant was named *Whorewood*, and in the count, and proceeding after, he was named *Horewood*; and this variance after verdict was alledged in arreſt of judgment.—But notwithſtanding it was held good; for it is as if there were no original, which is helped by the ſtatute; and if it be ſaid a variance, it may be amended: and the plaintiff had judgment.

CASE 39.

Wellock *againſt* Hammond.

Trinity Term, 32. Eliz. Roll 481.

A copyholder in borough Engliſh ſurrenders land worth 4l. a year to the uſe of his will, and deviſes it to his wife for life, remainder to his eldeſt ſon, *paying* 40s. to each of his four brothers and his ſiſter within two years after the death of his wife. The eldeſt ſon takes an eſtate in fee, and if he make default of payment the *youngeſt ſon* may enter; for the word *paying* ſhall be conſtrued a *limitation*, and not a *condition*. Antè, 146. Poſt. 360. 376. 378. 454. 833.

TRESPASS. The caſe upon ſpecial verdict was, *Thomas Wellock*, copyholder in fee of land of the nature of *borough Engliſh*, diſcendible to the *puiſne* ſon and *puiſne* brother, had iſſue four ſons and a daughter; and ſurrenders the land to the uſe of his will; and deviſeth the land to his wife for life, remainder to *John* his eldeſt ſon, *paying* forty ſhillings to each of his brothers and to his ſiſter, within two years after the death of his wife; and dieth. The wife enters; and dieth. *John* enters, and payeth not the legacies within two years; but within five years he payeth them. *William* the youngeſt ſon dieth without iſſue. *John* ſurrenders the land to the uſe of his will, and deviſeth them to his wife; and dieth. The wife enters, and takes the defendant to huſband. *Richard* as *puiſne* brother and heir enters: the defendant ouſts him; he brings treſpaſs; and it was found that the land was worth four pounds *per annum*. The queſtion was, If the entry of *Richard* was lawful?

GODFREY and COKE *for the plaintiff*.

The

The firſt point. The land being worth four pounds *per annum*, and *John* being to pay eight pounds, what eſtate paſſeth by the deviſe? And they argued, that an eſtate for life only paſſeth, for no eſtate is limited; and the conſideration is too little to make it a fee-ſimple. And GODFREY cited a caſe in 10. *Eliz.* between *Flatman and Clowton*, that it was held by all THE JUSTICES, except WESTON, accordingly: but when the conſideration is of the value of the land, or near the value, it is otherwiſe.—Second point, If the words *paying* be a limitation or condition? And they argued it was a limitation and not a condition; for if it be a condition it is void, and to no purpoſe, for it ſhall deſcend to him that is heir to the condition; and ſo is extinct, and no remedy to compel him to pay the forty ſhillings; and therefore the law ſhall conſtrue it a limitation of his eſtate, that it ſhall ceaſe if he doth not pay it; and the law ſhall transfer it to the heir in *borough Engliſh*. And although the words found as a condition, yet becauſe they being ſo conſtrued would be void, they ſhall be expounded as a limitation; and cited *Crickmer's Caſe*, which *vide ante*, *Mich.* 31. & 32. *Eliz. placito* 8.—SHIRLEY and JOHNSON *contra*. It is a fee-ſimple; for he payeth a conſideration for it, and the value is not material, and cited 29. *Hen.* 8. *Br.* "*Teſtaments*," 18. 6. *Edw.* 6. *Br.* "*Eſtates*," 78. 38. *Edw.* 3. 14.—Secondly, The words are ſufficient and apt to make a condition. 7. *Edw.* 6. *Dyer*, 74. 3. *Mar* 127. 18. *Eliz.* *Dyer*, 348. And this can be no limitation, becauſe the lands are limited to other, if he pays not the money. And be it a condition or limitation, it is not found there was any demand of the money, and ſo no breach.—CURIA. It is a fee, for the value is not material, and no book ſpeaks of the value. Secondly, It is a limitation, and not a condition; for if it be condition, it doth extinguiſh in the heir, and no remedy for the money; but being a limitation, the law ſhall conſtrue it, that upon the non-payment of the money his eſtate ſhall ceaſe, and then the law ſhall carry it to the heir by cuſtom, without any limitation over. And in a deviſe it may well be that an eſtate in fee ſhall ceaſe in one, and ſhall be transferred to another. Thirdly, The money was to be paid without requeſt: and it was adjudged for the plaintiff. *Vide* 3. *Co.* 20. b.

WELLOCK *againſt* HAMMOND.

S. C. 3. Rep. 22. 2. Leon. 114. Co. Lit. 9. b. 11. a. 6. Co. 16 a. Dyer, 371. 74. Cro. Jac. 527. 416. 591. 599. 1. Roll. Abr. 834. 2. Mod. 25. Bro. Teſt. 18. Bro. Eſt. 78. 2. Vern. 106. 519. Plowd. 413. 28. 10. Co. 41. 2. Brownl. 68. Gilb. on Dev. 21, 22. 119. Cro. Car. 138. Carth. 93. 171. 2. Roll. Rep. 219. 425. Goldſ. 134. Noy, 51. Owen, 112. 1. Leon. 283. 1. Lut. 809. Eq. Ca. Ab. 206. 3. Wiſ. 248. Com. Rep. 72. 123. Ld. Raym. 829. Salk. 242. Stra. 129. 799. 1086. 1128. Andr. 125. B. R. H. 98. 10. Mod. 419. 3. Com. Dig. 24. 35. 1. Bac. Abr. 328. 403, 404.

2. Bac. Abr. 72. 3 Bac. Abr. 18. 23. 4. Burr. 1933. 1940. 1. Bl Rep. 610. 2. Bl. Com. 156. Ld. Nott. Argument, 35. 1. Bro. Ch. Rep. 191. Swinb. 113. 4. Bac. Abr. 321. Powel on Dev. 263. Cowp. 836. 1. Bro. Caſ. Ch. 194.

Scroggs *againſt* Griffin.

CASE 40.

ASSUMPSIT. The plaintiff declared, that whereas one *Brown* and another did run for a wager of five pounds, which *Brown* did win; and upon communication of it, the plaintiff did affirm, that there was diſceit and covin uſed in the ſaid match; the defendant *adtunc et ibidem*, in conſideration of twelve-pence delivered to him by the plaintiff, aſſumed, that if he could *prove* that there was diſceit in the running, that he upon *requeſt* would give him forty ſhillings. Upon *non aſſumpſit* pleaded, and found for the plaintiff, it was alledged, that requeſt muſt be after the proof made.—CURIA *contra*. Proof ought always to be in the ſame action, but when proof is referred to a particular perſon; and he can do no otherwiſe than he doth here: the action includes proof and requeſt. And the plaintiff had judgment.

On a promiſe to pay on requeſt, if the plaintiff could prove a certain act, the action includes both proof and requeſt.

1. Lutwyche, 665. Cro. Jac. 232. 381. Hob. 92. 1. Sid. 313.

Bennet

CASE 41.

Bennet *againſt* Shortwright.

Trinity Term, 30. Eliz. Roll 774.

To ſet out the tenth ſheaf is a good modus for all tithe corn, and an iſſue may be taken on it.

2. Leon. 102.

PROHIBITION upon a ſuit for tithes of corn, wool, and calves. And for the corn makes ſuggeſtion, that they had uſed in the pariſh to pay the tenth ſheaf in ſatisfaction of all tithes for corn to the parſon; and that he ſet them out, and the parſon had them; and miniſtered this plea in the court chriſtian, and they would not allow it. It was held by THE COURT, it was a good ſuggeſtion; for if he ſet out the tithes, and the parſon would not take them, there is no reaſon he ſhould be charged again. And therefore GODFREY ſaid he would take iſſue upon it: and it was held he might.—For the wool, he made another ſuggeſtion. For the calves, he ſaid, they uſed to pay within the ſaid pariſh, &c. twopence for the milk of every cow in ſatisfaction of calves; and the proofs were, that there was ſuch a uſage for all the land, except five farms. And for this cauſe it was held he had failed in his preſcription, for it may be theſe lands were parcel of the five farms; but if it had been proved that the lands were not parcel, it had been otherwiſe.—And for this cauſe a conſultation was granted.

On a modus to pay 2d. for the milk of every cow in lieu of calves, if it appear that ſome farms were excepted, a conſultation ſhall go.

CASE 42.

Naſh *againſt* Molins.

A priory diſcharged of tithes at its diſſolution, continues ſo diſcharged in the hands of the king's patentee, and evidence that it had never paid, will prove the preſcription.

Poſt. 216

Bunb. 60. 296. Wood's Inſt. 374. 3. Burr. 1276. Vide Porter v. Bathurſt, Cro. Jac. 559.

PROHIBITION for ſuing for tithes in *Bocking-park* in *Eſſex*. And ſurmiſed, that the lands were parcel of the poſſeſſions of the priory of *Chriſt-Church* in *Canterbury*; and that the ſaid prior and his predeceſſors had held it diſcharged of tithes *tempore diſſolutionis*; and pleaded the 31. *Hen.* 8. c. 13. The defendant pleads, that the prior and his predeceſſors did not hold them diſcharged. Upon this iſſue was joined; and being tried at bar, it did appear upon the evidence, that the prior or his predeceſſors, time out of mind, never paid tithes. But no cauſe was ſhewn by unity of poſſeſſion, real compoſition, or other cauſe to ſhew it diſcharged. —COKE ſaid it was no evidence; for it is a preſcription *in non decimando*.—CURIA *contra*. For a ſpiritual man may preſcribe *in non decimando*, and by the 31. *Hen* 8. c. 13. he ſhall hold it diſcharged as the prior held it; and if he held it diſcharged, *non refert* by what means; for it ſhall be intended by lawful means.—And the jury afterwards found for the plaintiff.

CASE 43.

Tooley *againſt* Windham.

The promiſe of an heir in conſideration of forbearance of a ſuit in chancery to which he was not liable, will not ſupport an *aſſumpſit*.

Ante, 126. Poſt. 760.

1. Roll. Abr. 24. 28. Moor, 702. 685.

ASSUMPSIT. For that there were controverſies between him and the defendant for the profits of certain lands, which the father of the defendant had taken in his life-time; and that he had purchaſed a writ out of chancery againſt the defendant, to the intent to exhibit a bill againſt him. Upon the return of the writ for the ſaid profits, the defendant, in conſideration he ſhould ſurceaſe his ſuit, promiſed to him, that if he could prove that his father had taken the profits, or had the poſſeſſion of the ſaid land under the title of the father of the plaintiff, that he would pay him for the profits of the ſaid land; and ſaid *in facto*, that he had proved that the father of the defendant had taken the profits

1. Leon. 114. Yelv. 184. 1. Bulſt. 44. Strange, 592.

under

under the title of the father of the plaintiff: and upon *non aſſumpſit*, it was found for the plaintiff.—COKE. This is no conſideration; for the ſuit in chancery was unjuſt, and then the ſtaying of it is no good conſideration; and he ſheweth not how the father of the defendant did hold it, *viz.* by leaſe or otherwiſe.—CURIA. It is no conſideration; for if the father of the defendant did take the profits, it is not reaſon his ſon ſhould anſwer for them; and ſo the ſuit in chancery unjuſt, and the ſtaying of it no good conſideration: but if the ſuit had been for evidences, or otherwiſe, the ſtaying of it had been a good conſideration: but here it is for a perſonal *tort*; for which neither the executor or heir are to anſwer. —And *Trinity Term*, 33. *Eliz.* it being moved again, all THE COURT held it no good conſideration; for he did not alledge he was heir or executor, and ſo had no colour to charge him; and if it had been ſo alledged, yet no cauſe to charge him for a perſonal *tort*. And it was adjudged for the defendant.

TOOLEY *againſt* GRIFFIN.

Poſt. 183.

Humphrey Smalwood, Richard Cole, and Th. Sale, *againſt* the Biſhop of Coventry, and Marſh.

CASE 1.

Michaelmas Term, 32. & 33. *Eliz. In the Common Pleas.*
Eaſter Term, 32. *Eliz. Roll* 2065.

QUARE IMPEDIT brought by the plaintiffs as executors of *John Sale* for the archdeaconry of *Derby*, which was abated *Trin.* 31. *Eliz.* (*a*) and was now revived. And three queſtions were now moved.—Firſt, The plaintiffs did count of a grant of the next avoidance made to their teſtator, 23. *Eliz.* by the now biſhop the defendant, and made their title by it. If this grant be a good grant within the 1. *Eliz.* c. 19.? And if it be not good, if it be void againſt the biſhop himſelf, or only voidable by the ſucceſſor, and not by him that granted it?—Second, If the executors may maintain an action for a diſturbance made to their teſtator by the equity of the 4. *Edw.* 3. c. 7. which giveth action for goods taken in the time of the teſtator?—Third, The biſhop defendant pleads a preſentment by himſelf, as patron and ordinary of *Marſh*, the other defendant; and that he was inſtituted and inducted for ſix months before the action brought; and ſo pleads plenarty: If this were a plenarty within the ſtatute of *Weſt.* 2. ?—After argument by the ſerjeants, THE JUSTICES reſolved for the plaintiffs.—Firſt, That this grant was good againſt the biſhop that *granted* it; for the ſtatute was not made for his benefit, but for the benefit of his ſucceſſor, that he ſhall not be prejudiced by the act of his ſucceſſor. But they held that a grant of the *prochein* avoidance is within the 1. *Eliz.* c. 10. and his ſucceſſor may avoid it.—Secondly, That this action was within the equity of 4. *Edw.* 3. c. 7. for it is a chattel that ſhould go to the executor, if the diſturbance had not been; and for a diſturbance in their own time, they ſhall recover damages to the uſe of the teſtator; by the ſame reaſon, for a diſturbance in the time of their teſtator, they ſhall recover damages, by the equity of the 4. *Edw.* 3. c. 7.—

A grant of a next avoidance is good againſt the biſhop who grants it, but not againſt his ſucceſſor; and executors may bring a *quare impedit* on it; and a preſentment by the biſhop for ſix months before it is brought is not a *plenarty* within the ſtatute of Weſtminſter. Ante, 141. Poſt. 440. 3. Co. 59. 2. Roll. Abr 350. Co. Lit. 44, 45. Cro. Car. 59. 2. Inſt. 357. 5. Co. 15. 10. Co. 60. 1. And. 241. 1. Mod. 204. 2. Mod. 56. 2. Bac. Abr. 353. 391. 2. Term Rep. 606.

(*a*) Ante, 141.

Thirdly,

Thirdly, They all held, that this is not a plenarty within the ſtatute of *Weſt.* 2. for it muſt be *ex præſentatione, non ex collatione.* —And the plaintiffs had judgment.

CASE 2.

Carter *againſt* Ringſtead.

Hilary Term, 32. Eliz. Roll 120.

A declaration of uſes ſhall be expounded in the ſame manner as a will.

S. C. 6. Co. 64. 3. Co. 118. Cowp. 600.

TRESPASS. Upon ſpecial verdict the caſe was, *J. Bury*, 35. *Hen.* 8. was ſeiſed of divers lands in *Odyham*, and of the manor of *Stapely* in *Odyham*, and covenanted by indenture to ſuffer a recovery of all his lands of *Odyham*, and of the manor of *Stapely*, and of his lands in *W.* and *L.* and that this recovery ſhall be of all his lands in *Odyham*, to the uſe of himſelf and his wife for their lives, and after to divers other uſes; and for the manor of *Stapely* in *Odyham*, that the recovery ſhall be to the uſe of himſelf, and of the heirs of his body, and after to other uſes: the recovery was ſuffered accordingly. *Bury* dieth, and his wife married *Carter*. The queſtion was, If ſhe ſhall have all the lands in *Odyham*, or all except the manor of *Stapely*?

PER CURIAM. She ſhall have nothing in the manor of *Stapely*; for although by the firſt part of the deed ſhe is to have all the lands in *Odyham*, yet this being by way of declaration of his intent and meaning, it ſhall be expounded as a will, of which every part ſhall ſtand together if it may (*a*). And therefore it being expreſsly ſhewn, that the manor of *Stapely* ſhall be to other uſes, the law ſhall expound it ſo, and ſhall not be carried to her by the firſt words in the deed. And ſo the opinion of THE COURT was againſt the plaintiff.

(*a*) 1. Co. 95 b. Moor, 138. Co. Lit. 313. a. 6. Co. 64. b.

CASE 3.

Clavell *againſt* Mallory.

Anomala querela upon a ſtatute ſtaple lies in the king's bench, though it was acknowledged by an infant.

AUDITA QUERELA, upon a ſtatute ſtaple acknowledged by one within age. And it was much queſtioned if the ſuit might be in this court, or ought to be in chancery. 16. *Eliz. Dyer*, 322. And a precedent was ſhewn in 2. *Hen.* 5 that it lieth not here, but was to be in chancery.—But divers other precedents were ſhewn, that ſuits have been upon a ſtatute ſtaple in this court; and it was therefore ruled, that it lieth here, for the chancery hath no more record of it than this court; for the ſtatute doth remain with the party; and the precedents in the Book of Entries are, that ſuit had been here, and there is a writ for it in the Regiſter: and therefore they reſolved, that a ſuit might be upon it in this court, and in the queen's bench, as well as in chancery.

How the inſpection of infancy ſhall be pleaded.

Cro. Jac. 59.

Another matter was moved, that in the record the inſpection of the infant is not mentioned, and he is now of full age; ſo he cannot be inſpected.—But the prothonotaries ſaid, that the entry is, *quod venit in propriâ perſonâ*, and prayeth an inſpection, and the Court would adviſe of the proof of his age, and ſo is their common courſe; and accordingly a precedent was ſhewn, *Trinity*, 2. *Eliz. Roll* 194.—But THE COURT ſeemed to doubt of it, and would adviſe,

Rook

Rook *againſt* Wilmot.

CASE 4.

DEBT upon a recovery of damages in the exchequer. The defendant pleaded, that a *fieri facias* iſſued out of the exchequer to levy the damages, and upon it he had paid the money to the ſheriff, who was diſcharged of his office before the return of the writ (*a*); but the new ſheriff returned, that he *receit* ſuch a writ ſo indorſed, *viz. fieri feci de bonis, &c.* the ſum demanded (but the money was not brought into court). Upon this the plaintiff did demur.—And it was adjudged for the defendant, that the plaintiff ſhould be barred; for he having once paid the money, it is not reaſon he ſhould be compelled to pay it again; and the plaintiff is put to his remedy againſt the ancient ſheriff, if he will. *Vide poſtea, Tr.* 33. *Eliz.* 9 *Bing.* 264.

In debt upon a judgment, plea that the money was levied on a *fi. fa.* is good. Poſt. 238. Yelv. 44. Latch. 589. 5. Co. 90. Moor, 468. 4. Leon. 194. Sav. 123. And. 247. Cro. Jac. 73. 2. Lev. 203. 2. Mod. 214. Salk. 223. 2. Ld. Ray. 1072.

(*a*) See 20. Geo. 3. c. 37. and 3. Geo. 3. c. 15. ſ. 9.

John Fabian *againſt* Winſton.

CASE 5.

Trinity Term, 31. *Eliz. Roll*

TRESPASS for land in *Uxbridge*. The queſtion was upon the avoiding of a leaſe upon condition for non-payment of the rent. The condition was, that if he doth not pay the rent at the feaſts, in which, &c: or within twenty days after, that then, &c. And upon a ſpecial traverſe the iſſue was, If the plaintiff by *Edm. Bedle* demanded 7*l.* 10*s.* of rent due to him for half-a-year, the twentieth day after the feaſt, by the ſpace of half an hour before the ſun ſet? And upon a ſpecial verdict it was found, that the ſaid *Ed. Bedle petiit* 7*l.* 10*s. pro redditu dimidii anni*, ANGLICE for half-a-year's rent, *præfato J. Fabian tunc debit' pro tenementis prædictis*, and there remained demanding the rent by the ſpace of a quarter of an hour, *et non plus* before the ſun ſet, *tanquam ad* and after the ſun-ſet; and that no rent was due but the half year's rent due at the feaſt of the *Annunciation* before. The queſtion was, If this verdict was found for the plaintiff or defendant?—And all THE COURT held, as for the time, although it was not found to be half an hour, but a quarter of an hour, yet it was a good demand: for being demanded well enough for the time, it is not material although it be not preciſely according to the traverſe. But they all held this demand of the rent (then due) is not good; for he ought preciſely to ſhew upon his demand, what rent he demands; for if it were due five years before, it was then due; and therefore he ought expreſsly to ſhew what rent, and for what time he demanded it: and although the jury found that no other rent was due, yet it is not material, for the requeſt muſt be certain. And it was adjudged for the defendant.

The demand of rent muſt be of the preciſe ſum due, and in pleading it ought to be expreſſed when it was due, but a variance as to the duration of the demand is not material. Ante, 140. 157. 1. Leon. 305. Allen, 94. Co Lit. 202. a. Lut. 1139. Dougl. 483.

Giles Long *againſt* Heminge.

CASE 6.

Trinity Term, 30. *Eliz. Roll* 2024.

QUARE IMPEDIT, for diſturbing him to preſent to the church of *Fromebellett*. And declareth of an advowſon appendant to the manor of *Fromebellett*, by a feoffment of the manor by

An advowſon appendant is appendant to the *demeſnes* of the manor, and not to the *rents* or *ſervices*.—Dyer, 70. b. 1. Roll. Abr. 230. 12. Coke. 104. Co. Lit. 122. a. 2. Leon. 222. Sav. 103. 1. Leon. 207. 4. Leon. 216. Doder. Adv. 42. and ſee Mr. Hargrave's note [1] Co. Lit. 126. b.

LONG *against* HEMINGE.

Thomas Long. The defendant made title to it, and traverseth, ABSQUE HOC that *Thomas Long* enfeoffed him of the manor, with the advowson appendant. The jury found a special verdict, "that the said *Thomas Long* was seised in fee of a capital messuage "and demesne land in *Fromebellett*, and of the services of fealty, "and one penny rent, by the hand of *William Coyte*, who was "seised of certain lands in fee in *Fromebellett*, and held them by "the said services of the said *Thomas Long*; and that the said "capital messuage, lands, and services, were known by the name "of the manor of *Fromebellett*; and that the said advowson had "been always belonging to the said tenements, *sive manerio de Frome-*"*bellett*, and that 7. *Eliz.* the said *Thomas Long*, by parole without "deed, gave the said messuage, and all the said tenements, with "the advowson to the plaintiff, and made livery accordingly; and "afterward, 17. *Eliz.* the said *Thomas Long* granted the advowson "to the defendant; and that 25. *Eliz. Will. Coyte* the tenant did "attorn to the feoffment; and upon all this matter, they prayed the "discretion of the Court."—THE COURT resolved for the plaintiff; for they all agreed it was a good manor, though all the tenants but one are dismembered from it (*a*), and when the attornment came (*b*) he had then the entire manor. And they said, that an advowson is properly appendant to the demesnes, and not to the services; and by the livery of the demesnes, the advowson passed, and had passed, although there had been no attornment. And it was adjudged for the plaintiff.

(*a*) Vide 2. Bl. Com. 91. *cont.*
(*b*) Dougl. 281. Ante, 39.

CASE 7.

Bishop *against* Harecourt.

Trinity Term, 32. *Eliz. Roll* 511.

The essoin day is strictly the first day of the term; but *Trinity* being a moveable term, the Court will not *ex officio* take notice of its commencement or conclusion. Post. 227.

5. Co. 37. a. Cro. Car. 53. Cro. Jac. 548. 1. Roll. Abr. 525. 1. Sid. 308. 1. Leon. 328. 1. Mod. 196. 1. Term Rep. 116.

ASSUMPSIT. And declared, that in consideration of, &c. the defendant did assume *ad deliberandum quandam indenturam ante finem Termini Sanctæ Trinitatis tum proxim' sequent.* and the promise was, 5. *June*. The plaintiff alledgeth, that *Trinity Term incepit* 7. *die Junii, et finivit* 26. *die Junii*; and that he had not delivered, &c. Upon *non assumpsit*, it was found for the plaintiff; and it was moved in arrest of judgment, that the Court *ex officio* is to take notice of the beginning of the term, and that was the *essoin* day, which was 3. *Junii*, and then the indenture was not to be delivered till *Trinity Term* was a twelvemonth.—Of that opinion was ANDERSON; for the *essoin* day is the first day of the term, and so taken in all pleas and returns. The THREE OTHER JUSTICES *contra*. For the plaintiff had expressly alledged, that the term began the 7. *Junii*, and the defendant had not denied it; and the Court *ex officio* are not to search the rolls of the court, &c. But admitting they ought so to do, and although in law the *essoin* day is the first day of the term, and writs may be returned then, yet in common speech that is the first day when the Court sits.—And ANDERSON against his own opinion gave judgment for the plaintiff.

Hilary

Hilary Term,

33. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

William Parſons, *alias* Frowde, *againſt* Chriſtopher Parſons, *alias* Frowde. CASE 1.

Trinity Term, 32. Eliz. Roll

DEBT on bond for 500l. The condition was to ſtand to an arbitrement. The arbitrators amongſt other articles awarded, that the defendant ſhould enjoy a houſe called *Bennet's-houſe*, of which the plaintiff was leſſee for years during the term, paying to the plaintiff yearly twenty ſhillings; and for non-payment of this twenty ſhillings, action was brought. The defendant pleaded payment, and iſſue was joined, and found againſt him.—It was alledged in arreſt of judgment, that this was a condition annexed to the award, and by non-payment of it his eſtate ſhould ceaſe; and not ſuch part of the award, that for the non-payment of it debt ſhould be upon the obligation. But THE COURT held clearly, that this was part of the award, and for non-payment of it debt might be brought upon the obligation; and ſo was the intent of the arbitrators.

An award that *A.* ſhall *enjoy a houſe paying rent to B.* is not a condition, upon the non-performance of which the eſtate ſhall ceaſe.. Ante, 54. Moor, 3. Cro. Jac. 423. Barnes, 56.

Another exception was, that the replication was, *et prædictus Willielmus Parſons,*" and ſaith not "*alias Frowde,*" ſo part of his name is omitted, and he is not intended the ſame perſon that was named before.—But THE COURT held it not material; for it being "*et prædictus Willielmus,*" that which cometh afterwards is not material, and it cannot be intended another perſon; and if it be, it ſhall be amended. And it was adjudged for the plaintiff,—NOTA. *Mich.* 18. & 19. *Eliz. in Treſſam v. Robbins*, accordingly adjudged for the firſt point.

The omiſſion of an *alias dictus* will not vitiate an award.

See 9. & 10. Will. 3. c. 15. ſ. 2.

Robert Limmer *againſt* William Every. CASE 2.

ERROR. The error aſſigned was, That the ſaid *William Every* had brought debt upon an obligation by the name of *William Every*, adminiſtrator *bonorum et catallor. A. E. durante minore ætate* of *J. E.* executor of the ſaid *A. E.* executor of *R. Every*; and demands a debt upon an obligation of twenty-nine pounds made of the perſon to whom the infant's teſtator was executor.

An adminiſtrator *durante minore ætate* cannot bring an action for, or meddle with the goods 2. Lev. 239.

LIMMER *againſt* EVERY.

Hob. 246.

to the ſaid *R. Every*, the firſt teſtator; whereas he could not bring an action by this name, but as adminiſtrator of *R. Every*.—But it was ſaid, that adminiſtration of the goods of *R. Every* being committed to him by this name, *omnium bonorum, &c. A. E.* it may well be committed to him by this name; eſpecially when *A. Every* did not die inteſtate, but made an executor. 10. *Edw.* 4. *pl.* 1. that by the grant of adminiſtration of the goods of the executor, adminiſtration is by it granted of all the goods of the firſt teſtator. 27. *Hen.* 8. *pl.* 7.—CURIA *contra*, clearly. For by this adminiſtration committed he hath no authority to meddle with the goods of the firſt teſtator. And for this cauſe the judgment was reverſed.

CASE 3.

Wing *againſt* Earle.

Eaſter Term, 32. *Eliz. Roll* 208, *or* 408.

Statute miles ſhall be computed by the neareſt and moſt uſual way, allowing 1760 yards to each mile; and not by ſtrait lines, as a bird or arrow may fly. Poſt. 267.

Cawley, 130. 1. Hawk. 35. 3. Bac. Abr. 783. 2. Bl. Rep. 969.

DEBT upon an obligation. The condition was, that whereas the defendant had ſold certain woods to the plaintiff, growing upon certain land, called *Spalding*, in *Peaſemarch* in the county of *Suſſex*, if the plaintiff may enjoy it, &c. and if the ground whereupon the wood ſtandeth be four miles from *Rie*, that then, &c. The defendant pleaded, that the plaintiff may enjoy it; and this land by the neareſt and uſual highway for carriages is four thouſand paces, reckoning five foot to every pace, from *Rie*: upon which plea the plaintiff demurred.—COOPER, *ſerjeant*, argued, that the plea was not good, for he doth not anſwer to the condition, which is four miles; alſo for the miles it is mentioned in divers ſtatutes, 2. *Hen.* 4. c. 23. 1. *Eliz.* c. 15. 23. *Eliz.* c. 5. but in ſtatutes it ſhall be taken according to the intention of them, and this is according to the uſual ways, and not as a bird or arrow may fly: but in bonds no ſuch intent appeareth, and therefore it ſhall be according to the account of the country, and common reputation; and he anſwereth not to the miles, but to the paces.—TOWSE *contra*. We have pleaded ſo, becauſe we will not put it upon the country, but upon the law: for it is perilous to put it upon the country, when it is a doubt how it ſhall be conſtrued.—GAWDY and WRAY conceived, that to the exceptions to the pleading it was well enough; for if one thouſand paces make a mile, it is good, which *tantamount* that it is four miles; but the doubt is, how the miles ſhall be conſtrued; for WRAY ſaid, in *the caſe of Cambridge*, it was held that a mile ſhall be certain, and accounted by the moſt near way, and ſhall not be taken as a bird ſhall fly (*a*).

(*a*) See this caſe moved again, and adjudged for the plaintiff, poſt. 267.

CASE 4.

Foſter and Wilſon *againſt* Mapes.

Trinity Term, 32. *Eliz. Roll* 71.

If one party executes an indenture, it ſhall be his deed, tho' the other party does not execute it.

Hob. 35. Co. Lit. 229, a.

COVENANT upon an indenture. The defendant pleads *non eſt factum*; and the jury found, that this deed indented was made between the plaintiffs and the defendant, and that the defendant did ſeal his part, and delivered it to the plaintiffs; but they did not deliver their part, *&c. Et ſi, &c.*—And THE COURT without argument held clearly, that it was a good deed to charge the defendant. And FENNER ſaid, it hath been adjudged, that if a man

1. Wood's Con. 233. 1. Term Rep. 86.

bargains

bargains and sells his land by indenture, and the bargainor doth deliver his part of the said indenture, and the other never delivereth his counterpart, yet it is good. And for this point they resolved to give judgment for the plaintiff.

FOSTER & WILSON *against* MAPES.

But afterwards HOBART moved in arrest of judgment, that a sufficient breach was not assigned; for the covenant is, that whereas he had let to the plaintiffs the parsonage of *B.* that he would save them harmless, concerning it, against *M. Blunt:* and they alledge that *M. Blunt* entered upon them, and put them out; and that he was parson at the time of the entry, which is not sufficiently alledged, for it is not averred that the entry of *M. B.* was lawful; and if his entry was not lawful, it is no breach of covenant, for it is intended of a lawful interruption.

If a covenant be against the act of a particular person, interruption assigned as a breach is good, without shewing by what title. Post. 675.

CURIA *contra.* For when the covenant is to save them harmless against a person certain, he ought to defend him against the entry of that person, be it by *droit* or *tort*; for he is damnified if he be disturbed, though by wrong, as 2. *Ed.* 4. *pl.* 18. But if the covenant had been to save him harmless against all persons, there it shall be taken for a lawful entry or eviction; and the words "to save "harmless" amounts to more than a warranty, for that is for lawful titles: but here it is to be intended that *M. Blunt* had good title; for it is alledged that he is parson, and this is of the rectory; and that he entered and let it; by which it shall be intended he had interest. And it was adjudged for the plaintiff.

1. Roll. Abr. 430. Hob. 31. 2. Lev. 37. 2. Vent. 62. 1. Stra. 400. 1. T. Rep. 671.

Truffel's Case.

CASE 5.

HE was removed out of *London* by *habeas corpus*; and it was returned upon the writ, that he was detained there for one execution, and for divers other actions at the suit of divers persons. And it was moved to the Court, that he should be discharged of all the actions, and of the execution, for he is a person attainted of felony, and had neither lands or goods to satisfy them, and his body is not his own, but at the queen's pleasure.—And all THE JUSTICES held, that as to the actions he should be discharged, for a person attainted shall not be put to answer, nor shall be put in execution, and so are all the books. But they said they had spoken with the Justices of the common pleas, and Barons of the exchequer, who in both courts had adjudged the contrary, and upon the very matter in law, and not upon the form of pleading, but they would discharge their consciences as they had; for they found no book against their opinion; wherefore they all resolved he should be discharged of the actions: but for the execution they would advise, for then peradventure the party should lose it for ever.—But EGERTON, *Solicitor*, who moved it, said, When he is let at liberty by the act of the Court, this doth not discharge him of the execution for ever; and so it had been taken in this court. —Afterwards, *Pasch.* 33. *Eliz.* it was moved again, that he being attainted of felony, was let go at large, but not pardoned of the felony; and being at large, was arrested at the suit of *Ognell*, by a writ of execution upon a statute out of chancery; and afterwards he removed himself by a *habeas corpus* into the queen's bench, and removed the record of his attainder, and brought a *scire facias* against *Ognell*, comprehending all this matter,

A person attainted of felony cannot be taken in execution for debt, and shall be discharged from detainer upon *mesne* process. Sed vide contra post. 516. Ante, 164.

1. Leon. 326. 1. Bl. Rep. 33. See Rex v. Pedley, Cases in Crown Law, p. 304. Dougl. 545.

Trussel's Case.

Ognetl appeared, and *proteſtando* he was not the ſame perſon who was attainted, for plea ſaid that he was at large, and out of priſon when he was arreſted upon the writ of execution; and upon this it was demurred.—And afterwards, *Trinity*, 33. *Eliz.* they all reſolved that he ſhall be diſcharged of the execution, upon the ſtatute; for being a perſon attainted of felony, the queen hath intereſt in his body, ſo he cannot be taken in execution for debt: wherefore they did diſcharge him of it.

Case 6.

Andrews' Caſe of Grays Inn.

Demiſit, &c. raiſes a covenant againſt the entry of the leſſor, but not of *a ſtranger.* Poſt. 674.

GAWDY and FENNER, *Juſtices*, were of opinion, that upon a leaſe for years by indenture, by *demiſit*, *et ad firmam tradidit*, that a covenant lieth againſt the leſſor if he enters: but if a ſtranger enters, it lieth not without an expreſs warranty; for in covenant againſt the leſſor, upon theſe words he ſhall recover the term itſelf. 32. *Hen.* 6. *pl.* 32. 9. *Eliz. Dyer*, 258.

5. Co. 17. a. 773. 232. 10. 4. Co. 81. 2. Roll. Rep. 309. Palm. 388. Carth. 98. 1. Mod. 113. 8. Mod. 40. Mod. 233. 1. Wood Con. 371. 2. Leon. 104. 2. Ld. Raym. 915. Dougl. 27. 766.

Case 7.

Auſtin *againſt* White.

Words. Ante, 2. 2. Cr. 144. 430. Poſt. 289.

ACTION for theſe words: "Thou wert laid of the *French* Pox," adjudged actionable.—And FENNER ſaid it was adjudged in this court, that for theſe words, "Thou wert laid *of the Pox*, action did lie; for it cannot be intended but of the *French Pox* (*a*).

Ld. Ray. 710. (*a*) Vide 2. Vel. Term Rep. 475. where Mr. Juſtice Buller is reported to have ſaid, that this caſe is too looſely reported to be relied on.

Peake *againſt* Pollard.

Case 8.

Words not actionable.

ACTION for theſe words: "Thou art a mutinous and ſeditious "man, and didſt procure the queen's ſubjects to ſedition."—GAWDY. The words are not actionable, for it is not ſaid, he moved them to ſedition againſt the queen. And to this opinion THE OTHER JUSTICES did incline; but this was only upon motion.

2. Roll. 99.

Case 9.

Lacy *againſt* Reynolds.

In an action for words, the relative fact muſt be poſitively averred. Poſt. 308. 342.

ACTION for words, which were, "He is as very a thief as any "is in *Warwick* gaol;" and avers that *J. S.* was then a priſoner in *Warwick* gaol, condemned for horſe-ſtealing: and it was clearly held, that for theſe words action did lie, with this averment, but not otherwiſe.

1. Roll. Ab. 83. Cro. Jac. 687. Yelv. 90. Hutt. 72. March. 7. 1. Lev. 82. Hob. 6.

Upon a bad juſtification judgment ſhall be given by confeſſion, though the iſſue is miſjoined. Poſt. 228.

After verdict this matter was alledged in arreſt of judgment, that the defendant did plead the bar, *quòd quidam ignotus* came to *Warwick*, and there cut the purſe of *J. N.* and the plaintiff *ſciens* this, him did receive and comfort, and by reaſon of it ſpoke the words. The plaintiff replied *de injuriâ ſuâ propriâ*; and upon this iſſue was joined, and found for the plaintiff.—It was alledged that the iſſue is ill joined, for this matter doth not prove the plaintiff a thief, although it doth prove him a felon.—THE COURT held, that the iſſue was not well joined: but they conceived, that inaſmuch as he had by this confeſſed the

2. Roll. Ab. 98. Salk. 173. 1. Burr. 292. 297. 1. Stra. 397. 2. Ld. Raym. 924.

words,

words, although the iſſue is miſ-joined, and a miſ-trial, yet this is as void, and the Court ſhall give judgment upon his confeſſion; and the plaintiff ſhall not have his damages taxed by the Court, but ſhall have a new writ to enquire of damages. And it was ſo adjudged. *Vide* 22. *Edw.* 4. *pl.* 46.

LACY *againſt* REYNOLDS.

Damport *againſt* Thatcher.

CASE 10.

Michaelmas Term, 32. & 33. *Eliz. Roll* 519.

ERROR of a judgment given in the common pleas.—Firſt error. Becauſe, as it appeareth before, the record between them was removed into the queen's bench by a writ of error; and then the judgment in the *ſcire facias* was reverſed, as to the ſureties, and no judgment was given againſt the plaintiff; whereupon the plaintiff went into the common pleas, and ſhewed this matter to the Court, and prayed his judgment might be entered; and ſo it was, and judgment given, and entered upon record, which there remains: and this matter was aſſigned for error; for they had no authority to give judgment; for the record was removed from thence, before the writ of error brought, ſo they had no record before them to give judgment.

If *ſcire facias* againſt bail be reverſed, becauſe no judgment was entered by the Court below, the reverſal ſtands good, though judgment be afterwards given againſt the principal; and the want of a *hab. cor.* or *diſtringas* is aided after verdict. Ante, 145. Poſt. 259.

GAWDY. The writ of error was to remove the record, *ſi judicium inde redditum ſit*; ſo when no judgment was given, the record was not removed, but always remains with them, ſo that notwithſtanding they might give judgment upon it. 9. *Hen.* 6. *pl.* 4. 4. *Eliz. Dyer*, 206. And by this ſecond writ of error brought, it is affirmed that the firſt record doth remain with them. And of this opinion were THE OTHER JUSTICES. 2. Leon. 2.

Second error. For that the writ was brought againſt an adminiſtrator, and ſaith not that the inteſtate *obiit inteſtatus*.—*Sed non allocatur*; for ſo is the uſual form. 9. *Hen.* 5. *pl.* 6.

Third error. Becauſe it appeareth there was no *habeas corpus* or *diſtringas*, whereas the trial was by verdict, for this was certified upon a writ of *certiorari* awarded.—But it was held, that this is aided by the ſtatute of jeofails, 18. *Eliz.* c. 16. that after verdict judgment ſhall not be reverſed for want of a writ original or judicial. But they all held, if there never was a *habeas corpus* or *diſtringas* awarded, this ſhall not be aided by the ſtatute; for then they had no authority to take the jury; and they could not know if they were the jurors returned upon the firſt writ: but it ſhall be here intended there were ſuch writs, for the jury was taken; and it cannot be intended that they would or could call them without ſuch a writ; and upon this preſumption it ſhall be intended there were ſuch writs, but that they are embezzled; and this is directly aided by the ſtatute. And the judgment was affirmed; but the judgment in the *ſcire facias* ſtood reverſed as before.

Crews *againſt* Bayles.

CASE 11.

Trinity Term, 32. *Eliz. Roll* 149.

ERROR to reverſe an outlawry after judgment in a bill of privilege.—And becauſe no proceſs of outlawry was awardable, for *capias* did not lie in the original, it was held a manifeſt error, and the outlawry reverſed.

No outlawry except where a *capias* lies on the original. 1. Leon. 329.

Case 12.

Elegit granted on *devaſtavit* returned. Poſt 318. 530. 2. Leon. 188.

Meade *againſt* Cheyney.

THE plaintiff recovered againſt the defendant as executor of *Skipwith*; and upon a *fieri facias* a *devaſtavit* was returned; and upon this he prayed an *elegit, et habuit de terris executoris.* Mo. 299.

Case 13.

A biſhop may preſcribe *in non decimando* of a manor held in right of his biſhoprick, and it is not deſtroyed, though granted in fee, and then regranted to the biſhop. Ante, 206. Poſt. 475. 1. R. Ab. 653. 1. Leon. 248. Moor, 425. 2. Co. 44. 3. Burr. 1276.

Wickham Biſhop of Lincoln *againſt* Cooper.

PROHIBITION for ſuing for tithes. And made ſuggeſtion, that he and all his predeceſſors, &c. were ſeiſed of the manor of which the tithes were demanded, diſcharged of tithes during the time that it was in their poſſeſſion; and ſhewed, that in the time of *Edward* the 6th this manor was conveyed to *the duke of Somerſet*, and was afterwards regranted, and came to the biſhoprick again.—FLEMING moved for a conſultation; for it was a preſcription *in non decimando*, which cannot be; and upon his own ſhewing the preſcription was interrupted, and cannot be revived. —CURIA *contra.* For the preſcription for a ſpiritual perſon is good; and the biſhops of *Canterbury* and *Wincheſter* uſe to preſcribe ſo: and the preſcription is not determined when it came to the biſhoprick again; for tithe is not a thing iſſuing out of land; and unity of poſſeſſion doth not extinct them, nor a releaſe of all the right to the land. Wood Inſt. 268.

Case 14.

A huſband ſeiſed in right of his wife makes a parol leaſe, and *they* afterwards levy a fine, and die. The conuſee may avoid the leaſe. Ante, 130. 1. Roll. Abr. 389. 2. Co. 77. b. 1. Leon. 247.

Harvy *againſt* Thomas.

Michaelmas Term, 31. & 32. Eliz. Roll 414.

THE caſe was, *Harriſon* and his wife ſold the land of the *feme* by deed indented, but it was not inrolled within the ſix months; and afterwards the *baron* alone makes a leaſe by parol, and then the *baron* and *feme* levy a fine to the bargainee, and die. The queſtion was, If the conuſee of a fine ſhall avoid this leaſe?—And it was adjudged he ſhould; for being made by the *baron* only, it was void againſt the *feme*, and no acceptance could make it good; and as it ſhall be void to the *feme*, ſo to the conuſee: ſo of a rent charge granted by the *baron*, or a recognizance by him. And ſo it was reſolved in *Lord Mountjoy's Caſe*, 24. *Eliz.* that the recognizance of the *baron* ſhall not bind the conuſee of a fine; and the conuſee is in by the *feme*, and the *baron* joineth only for conformity. *Vide* 2. *Co.* 77. b.

Case 15.

A leaſe to *A.* for years; and *if he die, that then his wife ſhall have it during the whole reſidue of the term*, determines by the death of *A.* and the limitation to his wife is void. Ante, 9. 2. And. 208. 2. Leon. 218. Moor, 207. 2. Co. 153. 155.

Green *againſt* Edwards.

Trinity Term, 32. Eliz. Roll 1832.

THE caſe upon demurrer was, Land was let to *J. S.* for ninety years, if he liveth ſo long: and if he dieth within the term, that then his wife ſhall have it *durante toto reſiduo termini prædicti. J. S.* dieth within the term; the queſtion was, If his wife ſhall have it during the reſidue of the term?—And *Paſchæ*, 33. *Eliz.* it was reſolved by all THE JUSTICES, that ſhe ſhall not; for the term was wholly determined, and the limitation to her was void; for as a remainder it cannot inure; for a remainder muſt be created with the particular eſtate, and is to be limited for a certain eſtate, *viz.* for years, life, in fee, &c. And here no certain eſtate is limited to her; for although it is limited to her during the reſidue of the term, and ſo ſhall be intended a leaſe for years, yet foraſmuch as every leaſe for years is to have a certain commence-

ment and ending, here it is uncertain if ſhe ſhall ever have it, for *J. S.* may outlive the ninety years, and therefore a termor cannot grant his term after his death, and ſo the remainder here is void.—But ANDERSON ſaid, (*a*) if the wife had been party to the deed, this peradventure might have been good to her, not by way of remainder, but by immediate grant and demiſe for ſo many years which ſhould be to come; and *durante termino* ſhall not be taken for the intereſt, but for the time: which WALMSLEY and WYNDHAM did expreſsly deny; for they held, it is at firſt void for the uncertainty when it ſhall commence, or whether it ſhall commence. And it was adjudged that the wife took nothing. *Vide* 1. *Co.* 155.

GREEN *againſt* EDWARDS.

(*a*) Vide Wright v. Cartwright, 1. Burr. 284. where *Lord Mansfield controverts* the propriety of *Anderſon's* reaſoning in this caſe.

Vautry *againſt* Aplen.

CASE 16.

Where a deed is only inducement to the action, it need not be pleaded with a *profert*. Ante, 153.

REPLEVIN. Defendant juſtifies as ſervant to *J. S.* as in his freehold. The plaintiff conveyeth by a leaſe for years, from the queen by her letters patents, but ſaith not *curiæ hic prolat.* and traverſeth the freehold of *J. S.* Upon this the defendant demurreth generally, for want of theſe words, *curiæ hic prolat.* and doth not ſhew it for cauſe; and if it were matter of ſubſtance or of form, and ſo amendable by the 27. *Eliz.* was well debated. —PERIAM and WALMSLEY at firſt conceived that it was matter of ſubſtance; for by this manner of pleading, the defendant loſt the advantage to demand *oyer* of the patents; for without ſaying "*hic in curiâ prolat.*" he cannot demand *oyer*; and if there be variance between them and the pleading, he may pray that they be entered *in hæc verba*, of which now he hath loſt the advantage.— But afterwards *Paſchæ*, 33. *Eliz.* it was held by all THE JUSTICES (except WALMSLEY), that it was but matter of form, and not much material; for it was but an inducement to the traverſe, and ſo not traverſable, and it may be amended. And they ſaid, if the defendant maketh no defence, and that there wants an averment to the plea, theſe may be amended, and ſhall be inſerted, for the truth of the matter appeareth; and in this caſe the letters patents are not iſſuable. But PERIAM ſaid, if ſuch plea had been in an avowry when it was iſſuable, it ſhould be otherwiſe. And it was adjudged accordingly for the plaintiff.

10. Co. 88. a. 98. b. 2. Bulſt. 228. Stile, 193. 264. Jones, 377. Cro. Jac. 43. 70. 673. Cro. Car. 442. 1. Ro. Rep. 13. 328. Palm. 387. 3. Mod. 52. 2. Mod. 277. Hob. 301. Ld. Ray. 762. 2. Salk. 497.

See 16. & 17. Car. 2. c. 8. Salk. 497. 6. Mod. 135. and 4. & 5. Ann. c. 16.

Richmond *againſt* Butcher.

CASE 17.

Hilary Term, 33. *Eliz.* *Roll* 315.

Tenant in fee makes a leaſe for years rendering rent during the term to him, his executors and aſſigns, the heir ſhall not have the rent. Poſt. 832.

REPLEVIN. Upon demurrer the caſe was, *John Colvell* was ſeiſed in fee, and let the land for twenty-one years, rendering twenty ſhillings rent during the term, to him, his executors and aſſigns, and dieth. The defendant, as ſervant to his heir, for rent behind after the death of the leſſor, diſtraineth; and after argument it was adjudged, that the heir ſhall not have the rent; for it being reſerved to the leſſor, his executors and aſſigns, and the heir being none of them, he cannot have it. 27. *Hen.* 8. *pl.* 15. 21. *Hen.* 7. *pl.* 25. 10. *Edw.* 4. 18. 11. *Edw.* 3. 86.—NOTA. They relied upon a book ſhewn to them in writing in 12. *Edw.* 2. where it was ſo adjudged (*a*).

2. Ro. Ab. 450. S. vid. Lat. 99. 5. Co. 111. Com. Dig. 423.

1. And. 361. 12. Co. 35. Roll. 613. 635. Jones, 309. Noy, 96. Cro. Jac. 290. Cro. Car. 289. Lat. 255. 264. 2. Saund. 370. Owen, 9. Co. Lit. 47. a. note [8] 5.

(*a*) See the caſe of Sacheverel v. Frogart, 1. Vent. 161. 2. Saund. 367. Ray. 213. 2. Lev. 13. where this point is adjudged, and the exiſtence of the caſe in 12. Edw. 2. denied. See 5. Co. 115 a.

Case 18.

Foſter *againſt* Fountain.

A deed to lead the uſes of a fine not good if delivered after the fine levied, unleſs the conuſor agreed to the uſes.

EJECTIONE FIRMÆ.—It was held upon evidence by THE COURT, that if a fine be levied, and an indenture to lead the uſe of it be ſealed and delivered afterwards, this is not ſufficient to lead the uſe of the fine, except it be averred and proved that the conuſor intended before the fine levied, to levy it to this uſe. *Quære.*

Dyer, 136. 9. Co. 10. 15. Moor, 192. 1. And. 125. 5. Com. Dig. 621.

See 29. Car. 2. c. 3. and 4. & 5. Ann. c. 16.

Case 19.

Bind *againſt* Plain.

If a plaintiff who has obtained judgment in an inferior court, is, by any means, in poſſeſſion of the defendant's goods and re-delivers them to him on a promiſe that his debt ſhall be paid, it is a good conſideration *in aſſumpſit*, though the defendant had only a ſpecial *intereſt* in them, and the general *property* reſided with a third perſon.—And neither the authority of the inferior court, nor where the goods where, nor the time, or place of requeſt, need be alledged. Poſt. 884.

Cowper, 128. 1. Term Rep. 251.

THE plaintiff counts, that whereas he recovered againſt *Thomas Ward* in the queen's court in *Southwark*, held before the ſteward of the mayor of *London*, twelve pounds, and had a *fieri facias* to the bailiff there to make execution of the goods of the ſaid *Thomas Ward*, which were in his hands; and whereas the bailiff was ready to do execution of the ſaid goods, the defendant did aſſume to the plaintiff, in conſideration that he 11th of *September* delivered to him the ſaid goods, that he would within fourteen days after *Michaelmas* pay to him twenty marks, or otherwiſe deliver to him the ſaid goods again, if in the mean time no other made title to them, and proved them to be his goods; and averred that none made title to them between the 11th of *September* and fourteen days after *Michaelmas*. The defendant pleads *non aſſumpſit*. The jury find the recovery and the *aſſumpſit*; but find further that the ſaid *Thomas Ward*, long time before the recovery, had ſold the goods to *R. W.* but with this proviſo, that he ſhall have the poſſeſſion of them for four years, which are not yet expired; and if he then pay ſuch a ſum of money, the ſale ſhould be void, and that *R. W.* made title to them by force of this ſale. *Et ſi, &c.*

COOPER, *ſerjeant*, alledged, that the declaration was not good.—Firſt, Becauſe it was not ſhewn by what title the court of *Southwark* was held.—Secondly, That the bailiff was ready to make execution, but ſheweth not where the goods were. But theſe exceptions were over-ruled not to be material, for they are but the inducement and conveyance to the action.—Thirdly, There was neither time nor place of requeſt alledged, but only *ſæpius requiſitus. Sed non allocatur*; for it is to be paid at a day certain, and no requeſt needful; otherwiſe, if requeſt ought to have been made.—Fourthly, That upon the matter found judgment ought to be for the defendant; for it is found, the plaintiff had only a ſpecial property, and the vendee the general property, and ſo no cauſe of the re-delivery, and ſo no cauſe of the conſideration; and it is found the vendee had title, ſo it is ſufficiently proved a ſtranger had title.—But *Paſ.* 33. *Eliz.* THE COURT reſolved for the plaintiff; for they held, that the plaintiff having poſſeſſion of the goods *quomodocunque* he came to them, he is chargeable to *Thomas Ward* for them, although he hath but a ſpecial property, and he may maintain an action for them; ſo his delivery of the goods is a ſufficient conſideration; for by this the defendant had the benefit of the uſe of them, and the plaintiff hath loſs, for he is chargeable to the action of *Thomas Ward*; and eſpecially the conſi-

deration

deration is good, being only for the re-delivery of them, or payment of ſuch a ſum. And although he recited that he had theſe goods liable to the execution, which is not true; for *Thomas Ward* having only a ſpecial property, they are not liable to this debt; yet this is but a naked and void recital, and all the ſubſtance of the declaration is upon the delivery of them; and this being found, it was a good *aſſumpſit*.—It was adjudged for the plaintiff; and on error brought, the judgment was affirmed (*a*).

Bind *againſt* Plain.

(*a*) Poſt. 301.

Mulgrave *againſt* Ogden.

Case 20.

ACTION SUR TROVER of twenty barrels of butter; and counts that he *tam negligenter cuſtodivit* that they became of little value.—Upon this it was demurred, and held by all THE JUSTICES, that no action upon the caſe lieth in this caſe; for no law compelleth him that finds a thing to keep it ſafely; as if a man finds a garment, and ſuffers it to be moth-eaten; or if one find a horſe, and giveth it no ſuſtenance: but if a man find a thing and uſeth it, he is anſwerable, for it is converſion: ſo if he of purpoſe miſ-uſeth it; as if one finds paper, and puts it into the water, &c. but for negligent keeping no law puniſheth him. *Et adjournatur.*

Trover will not lie for negligent keeping any thing; but if the thing be uſed or abuſed, it is a converſion.

1. Ro. Ab. 2, 3. 124. Co. Lit. 89. a. 2. Bulſt. 21. *cont.*

Bull. N. P. 74. Salk. 655. Mod. Caſ. 170. Strange, 60. 123. 576. 813. 1. Term Rep. 12. 2. T. Rep. 755.

Jennings *againſt* Gower.

Case 21.

DEBT as executrix. The caſe was, The teſtator of the plaintiff deviſeth a term to *J. Watts*, and that "if *Agnes* his wife ſuffers the deviſee to enjoy it three years, that ſhe ſhall have all his goods as executrix; but if ſhe doth diſturb him, then he makes *G. J.* his ſon his executor;" and dieth. *Agnes* as executrix brings the action within three years.—ANDERSON at firſt conceived that the action could not be brought within the three years, for this is a condition precedent, ſo that until the performance of it ſhe ſhall not be executrix: but the OTHER JUSTICES held ſhe was executrix preſently; for although in grants, eſtates ſhall not be till the condition precedent be performed, yet it is otherwiſe in a will, for a will ſhall be guided by the intent of the party; and this ſhall not be conſtrued as a condition precedent, but as a condition to abridge her power to be executrix if ſhe perform it not; for ſo (by PERIAM) the intent appeareth here by the words ſubſequent, *viz.* "if ſhe diſturb, that then *G. J.* to be executor," which doth prove that in the mean time he intended ſhe ſhould be executrix.—Afterwards in *Eaſter* term, 33. *Eliz.* it was adjudged for the plaintiff, that ſhe was executrix until ſhe diſturbed, and that the plea of the defendant, *viz.* that ſhe had made diſturbance, was not good, without alledging in particular *how* ſhe diſturbed.

Deviſe of a leaſe to *A.* and if *B.* ſuffer him to enjoy it for 3 years, ſhe ſhall be executrix; but if ſhe diſturb him, then *C.* ſhall be his executor.

This is not a *condition præcedent*, and *B.* is immediately executrix.

Poſt. 914.

S. C. 1. Leon. 229. Winch. 115. 1. Ro. Ab. 415. 3. Lev. 132. 8. Co. 91. a. 2. Ld. Ray. 765. Dougl. 63. 685. 1. T. Rep. 645.

Smy *againſt* June & Alios.

Case 22.

EJECTIONE FIRMÆ. The caſe upon ſpecial verdict was, *Sir Thomas Cotton* was ſeiſed of the land in queſtion in fee, and conveyeth it to the uſe of himſelf for life, remainder to *Cheyny Cotton* his eldeſt ſon in tail, remainder to *William* his ſecond ſon, "*et primogenito filio prædicti Willielmi et hæredibus maſculis dict' primogeniti filii dict' Will. et pro defectu talis exitûs, remanere inde hæredibus*

The ſtatement of the caſe *vide infra.*

2. Inſt. 519. 1. Leon. 211. Cro. Car. 200.

SMY against JUN & Allos.

"*hæredibus maſculis dict' Willielmi,*" *and of Sir Thomas Cotton*, with divers remainders over. *Cheyny Cotton* dieth without iſſue; and after *William* the ſecond ſon had iſſue *W.* his eldeſt ſon, and goeth beyond ſea. *Sir Thomas Cotton*, 29. *Eliz.* levieth a fine of this land, which was to the uſe of himſelf for life, and after to the uſe of *Robert Cotton* his third ſon in tail, with divers remainders over; and afterwards 21. *Eliz. William* the ſecond ſon dieth beyond ſea, *William* his ſon and heir being then and now within age. *Sir Thomas Cotton* dieth 27. *Eliz.* and 31. *Eliz. W.* enters, being within age, and lets it to the defendant, reſerving no rent, but at will only. *Robert Cotton* enters and lets it to the plaintiff; upon which the defendants re-entet. *Et ſi, &c.*

It was argued by DREW and GLANVILE, *ſerjeants, for the defendants*, and by BEAUMONT and HAMON *for the plaintiff.*

The uſe of a fine to *A.* and his eldeſt ſon, and the heirs male of the ſon does not make an eſtate tail.

FIRST MATTER. If *William* the ſecond ſon had an eſtate tail by the limitation to him and his firſt ſon, and to the heirs males of the body of his firſt ſon, for he then had no ſon; ſo it is void to the firſt ſon, if it ſhall veſt in *William* by the intent of the donor.

A remainder to the heirs male of *A.* and *B.* gives them ſeveral eſtates. 3. Com. Dig. 165. 219. 254. 359.

SECONDLY, Admit he hath not an eſtate tail by this limitation (as it was after agreed by all THE JUSTICES that he had not) if by the remainder after limited to the heirs males of the body of *William* and of *Sir Thomas Cotton*, they have joint or ſeveral eſtates tail: and as to that, it was clearly agreed that they have ſeveral eſtates tail and not joint; ſo that clearly the fine of *Sir Thomas* was good to bar *William* of one moiety, for he was tenant in tail of it.

The ſon of a perſon who dies beyond ſea ſhall have five years after his death to avoid a fine.

Cruiſe on Fines, 232. to 241.

THIRD MATTER. Upon the 4. *Hen.* 7. c. 24. ſ. 4. if the fine being levied *William* the ſon being beyond ſea, if his heir ſhall have five years after his death; for the ſtatute is, he ſhall have five years after his return; and in this caſe he never returns, and ſo is out of the words, and the proviſo ſhall not be taken by equity.—But all THE JUSTICES to this reſolved to the contrary, for the intent of the ſtatute ſhall be obſerved; as the ſtatute ſpeaks, that an infant ſhall make his claim within five years after his age, yet if he claimeth within his age, it is good, yet it is out of the words.

Tenant for life levies a fine, the reverſioner ſhall have five years after *his* death to make claim. Poſt. 254.

FOURTH MATTER. If tenant for life levy a fine, and he in the reverſion or remainder dotlt not, make his claim within *five years* after the fine levied, after the tenant for life dieth, if he ſhall have new five years after his death.—And all THE JUSTICES held he ſhould, for this is as another title accrued to him; and it may be he had no conuſance of the forfeiture; and if he had, it is at his election if he will take advantage of it; and ſo *Zome's Caſe* was cited to be adjudged, 7. *Eliz.*

9. Co. 105. b. Cro. Jac. 157. Plowd. 374. Shep. Touch. 31. Cruiſe, 215.

Leaſe by an infant is void. Moor, 105. 1. Mod. 263.

FIFTH MATTER. That yet the plaintiff ſhall recover, for the title of the defendants was void; for they claim by leaſe at will of an infant where no rent was reſerved, and ſo void.

Fitz. 301. 10. Mod. 421. 3. Bac. Abr. 304.

One tenant in common ſhall not have ejectment againſt the other without actual ouſter. Co. Lit. 199. 1. Leon. 212.

CURIA. Although they have no title, yet it appeareth the plaintiff had no title to a moiety, and then he could not puniſh the defendants for his moiety in this action, where he muſt make title; otherwiſe perhaps in treſpaſs: and for the other moiety, he ſhall not have an action without an expreſs ouſter, which is not found. Wherefore it was adjudged for the defendants. *V. Co.* 2. *Inſtitutes* 519.

Salk. 391. Cowp. 217. 1. Term Rep. 759. in notis.

Sir Moyle Finch *againſt* Throckmorton.

Case 23.

33. Eliz. In the Exchequer Chamber.

Hilary Term, 32. Eliz. Roll .

Where a leaſe is *ipſo facto* void by the condition, no acceptance of rent afterwards can make it to have continuance; and the reverſion being in the crown, the king's patentee may enter without office found. Ante, 3. 167. Poſt. 855.

THE caſe upon demurrer was, that King *Philip* and queen *Mary*, 1. & 2. *Ph. & Mary*, demiſed the ſite of the priory of *Raveſton* in the county of *Bucks* to *Th. Throckmorton* for ſeventy years, rendering rent at the feaſts of the *Annunciation* and *St. Michael*, with a *proviſo*, that upon non-payment within forty days after the feaſts, the leaſe ſhould ceaſe and be void. 9. *Eliz.* the rent was not paid at *Michaelmas*, nor within forty days after; but afterward the queen's receiver received it, and maketh an acquittance as if it had been paid at the day, and receiveth the rent afterwards every year till 30. *Eliz.* and makes acquittances of it. 10. *Eliz.* the queen grants this land in fee to *Sir Thomas Henneage*, and afterward an office was found, which found the non-payment 9. *Eliz.* upon which *Sir Thomas Henneage* entered, and let it to the plaintiff.

1. And. 303. Pop. 25. 53. Moor, 291. 1. Roll. Abr. 475. 2. Roll. Abr. 184. 215. 2. Leon. 134. Co. Lit. 215. Cro. Car. 100. 273. Cro. Jac. 56. 344. 3. Co. 64. b. 10. Co. 114. b. 5. Co. 52. a. Plowd. 131. Cowp. 482. Dougl. 57. 2. Term Rep. 425. 2. Co. 344.

First Question was, If the leaſe was void or not without office?—Second, If the acquittance could make it good?—Third, Admit there muſt be an office, if after the patent it cometh time enough for the patentee to avoid it?—And this was divers times argued at the bar, and afterwards by the *Barons*.

And all the Barons agreed for the plaintiff; and that this leaſe was void immediately upon the non-payment; for the words are, that upon non-payment the leaſe ſhall ceaſe and be void, ſo that the land is diſcharged of this contract of the term, and the patentee is no longer a termor, nor (as Manwood ſaid) a tenant at will, nor at ſufferance, but only as a bailiff or pernor of the profits *de ſon tort*, and then all the acceptance after cannot make a void leaſe good; and the office is only neceſſary to inform the queen when the condition was broken, to intitle her to all the mean profits, and to reduce the poſſeſſion, if the eſtate had continued out of the queen: but as this caſe is only to intitle her to the mean profits, and being found only for this purpoſe, it is well enough for the time, notwithſtanding the patent of the inheritance; for they held, that the firſt eſtate ended as by limitation, and in ſuch caſe no office is needful to intitle the queen: alſo it ends by the limitation in the firſt letters patents, which are a record; ſo the record which doth create it doth deſtroy it, and the patentee might enter as in land of which there was no leaſe. And it was adjudged for the plaintiff.—Nota. A writ of error was brought in the exchequer-chamber, and error aſſigned in the matter of law; and after argument, *Mich.* 36. & 37. *Eliz.* the judgment was affirmed.

Termino

Eaſter Term,

33. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Fermor *againſt* Dorrington.

"I will prove "*him* to be a "perjured knave," are actionable. Poſt. 730. Cro. Jac. 214.

ACTION for words, which were, "I will prove *Fermor* to "be a perjured knave." After verdict it was alledged in arreſt of judgment, that the words are not actionable, for he doth not ſay he was perjured, but that he would prove him perjured; for it may be, that if he doth any act after that he may be convinced of it.—But all THE COURT held, that the action lay, and the words cannot have ſuch conſtruction.

Judgment ſtayed for a diverſity in the chriſtian name of a juror between the *venire* and *diſtringas*. Ante, 57. Poſt. 256. 258.

5. Co. 42. Cro. Car. 203. Cro. Jac. 116. 558. Hob. 64. 3. Bac. Abr. 276. Cowp. 425.

ANOTHER matter was alledged, that in the *venire facias* and *diſtringas*, one *Taverner* was named one of the jurors; but in the return of the *diſtringas* in lieu of *Taverner* one *Turnor* was returned, and was ſworn, and tried the matter; ſo it is a miſ-trial, being tried by one that was not returned in the *venire facias*. And COKE cited a precedent in this court between *Douſby* and *Willot*, where a juror was returned by the name of *Gregory Willot*, and in the *diſtringas* he was named *George Willot*, and he with others paſſed upon the inqueſt; and for this cauſe the judgment was ſtayed. And another precedent in the exchequer, where one *Mizael* was returned upon the *venire facias*, and upon the *diſtringas* one *Michael*, and both theſe were returned for ſirnames; and becauſe *Michael* was ſworn, &c. the judgment was ſtayed.—And ſo it ſeemed to THE COURT; but they at firſt doubted if the variance in the ſirname be a cauſe to ſtay judgment; but for variance in the chriſtian name, they agreed clearly the judgment ſhall be ſtayed, but one may have two ſirnames. But afterwards it was reſolved the judgment ſhould be ſtayed.

CASE 2.

Taylor *againſt* Beal.

Quære, If a leſſee is authoriſed to expend part of the rent for the repairs of the premiſes? 1. Leon. 237. 320. 2. Ld. Ray. 420. Doug. 748. 1. Term Rep. 454. 457. 2. T. Rep. 630.

DEBT for rent reſerved upon a leaſe for years. The iſſue being joined if the rent were paid or not, the defendant gave in evidence for part of the rent, that the plaintiff by covenant was to repair the houſe and did not, and that thereupon he expended part of the rent in repairing the houſe. The queſtion was, If this evidence will maintain the iſſue?—GAWDY conceived it did, for the law giveth this liberty to the leſſee to expend the rent in reparations, for he ſhall be otherwiſe at great miſchief, for the houſe may fall upon his head before it be repaired; and therefore the law alloweth him to repair it, and recoupe the rent. *Vide* 12. *Hen.* 8. *pl.* 1. 12. *Rich.*

12. *Rich.* 2. *Barr.* 242. 14. *Hen.* 4. *pl.* 27.—FENNER. It is no evidence; for if the leſſor will not repair it, he is to have his covenants againſt him.—CLENCH ſeemed he might well expend the rent in reparations, but he ought to have pleaded it, and cannot give it in evidence upon the general iſſue; and they thereupon moved the jury to find the ſpecial matter. And as to the reſidue of the rent, he ſhewed that he paid it to others that had rent-charges out of the lands, which the leſſor had covenanted to pay, and that by the commandment of the leſſor he paid the rent, in diſcharge of the ſaid rents: and this was clearly held good; for payment to another by the plaintiff's appointment, is payment to himſelf.

TAYLOR *againſt* BEAL.

Truſloe *againſt* Yewre.

CASE 3.

IT was agreed upon evidence, that where a controverſy was between two perſons for a leaſe of land, who ſubmitted themſelves to the arbitrement of *J. S.* for it, and *J. S.* did award that one of them ſhall have the land, this is a good gift of the intereſt of the term. 12. *Aſſiſe*, 25. But if the award were, that he ſhall permit and ſuffer the other to enjoy the term, this giveth not the intereſt in it.

The intereſt of an eſtate for years transferred by an award. Poſt. 348. Wood Inſt. 525. 1. Roll. Abr. 242. Dyer, 183. 3. Bac. Abr. 421. 2. Leon. 104.

ALSO it was held, that if a term be deviſed to an executor, the remainder over, and the executor enters generally, this ſhall be taken as a deviſe, for it is more for his benefit.—They moved the jury to find theſe matters ſpecially, but they would not, but gave a general verdict.

Election. 10. Co. 47. b. Plowd. 520. 2. Co. 37. 2. Bac. Abr. 187. 435.

Gore *againſt* Parkhurſt.

CASE 4.

EJECTIONE FIRMÆ. Bail was put in for the defendant by the name of *Parkes*, but the declaration and all the proceeding was by the name of *Parkhurſt*; and this matter after verdict was alledged in arreſt of judgment.—And *Trin.* 33. it was adjudged, that for this cauſe, *plaintiff nihil cap. per billam*; for it doth not appear that the defendant againſt whom the judgment was given, was *in cuſtodiâ marteſchalli*, and otherwiſe the proceeding againſt him is *coram non judice*, 31. *Hen.* 6. *pl.* 10. and it cannot be intended the ſame perſon, neither can it be amended. And THE COURT ſaid, if there be a bail, and the bail piece is pulled off the file, the party without remedy.

If the bail-piece is in a different name from that in the other proceedings, or be taken off the file, judgment ſhall be reverſed. Poſt. 894. Hob. 264. Moor, 694. Cro. Jac. 698. Strange, 921.

Anonymous.

CASE 5.

IN an appeal of murder, the defendant was acquitted, and the abettors and damages were enquired and aſſeſſed to ſixpence.—GODFREY moved that the damages might be increaſed by the Court, as they may by the ſtatute *Weſt.* 2. c. 12.—And THE COURT ſaid, they ſhall be increaſed.

Damages increaſed on acquittal in appeal. 22. Aſſ. 19. 2. Inſt. 387. 2. Hawk. 289.

Withington *againſt* Dalaber.

CASE 6.

IN appeal of murder by a *feme*, the defendant pleaded *nient accoupl' in loyal matrimony*; *et ſi trove que ſoit*, not guilty to the felony. The plaintiff replies, that ſhe was *accoupled in loyal matri-*

The general iſſue in felony muſt be traverſed by the replication, when it is accompanied by a ſpecial plea triable by the common law.—Poſt. 495. 3. Leon. 268. 2. Hawkins' Pleas Crown, 283.

WITHINGTON *againſt* DALABER.

mony, and doth not anſwer or plead that he was guilty of the felony. And it was moved, that this was a diſcontinuance.—CURIA. When a plea is pleaded which is triable at common law, and concludes over to the felony, there the plaintiff ought to reply and conclude over to the felony; but when he pleads a plea triable otherwiſe than by the common law, it is otherwiſe.

CASE 7.

Dethick's Caſe.

A cathedral is within the 5. *Edw.* 6. c. 4.—

HE was indicted upon the 5. *Edw.* 6. c. 4. for ſtriking in *Saint Paul's* church-yard: and it was moved, that it being in the church-yard of a cathedral church, it is not within the ſtatute. —CURIA *contra.*

Garter king at arms is a name of dignity, and the poſſeſſor muſt be ſued by it.—*Quære*, If in matters not concerning his office? Vide poſt. 542.

Then he pleaded, that he was by the queen's patent created GARTER *king of arms*, and demands judgment, becauſe he is not ſo named.—And becauſe it was a name parcel of his dignity, and not of his office only; for the patent is, *creamus coronamus et nomen imponimus de* GARTER *rex heraldorum*, and therefore in all ſuits againſt him he is to be named by this name; for this cauſe he was diſcharged of the indictment.

8. C. 1. Leon. 248. Carth. 440. Strange, 850. Bar. K. B. 209. Fitzg. 175. 275. 3. Bac. Abr. 57.

CASE 8.

Lady Ratcliff *againſt* Shubley.

Trinity Term, 31. *Eliz. Roll* 415.

It is ſufficient if words of defamation be *ſubſtantially* proved.

ACTION for words, "She is *as very a thief* as any that robbeth "by the highway-ſide." Upon not guilty pleaded, the jury found that he ſpake theſe words, "She is *a worſe thief* than any "that robbeth by the highway-ſide." The queſtion was, If upon theſe words found by the verdict ſhe ſhould have judgment?—THE COURT held clearly, that the words in both caſes are actionable: but GAWDY and FENNER held, that the words found do not agree with the declaration; for the jury do not find that the defendant at the time mentioned in the declaration ſpoke the words in the verdict; ſo it may be he ſpoke them at ſeveral times; and differs from *Bridge's Caſe*, *Dyer*, 75. where the jury found he ſpake part of the words but not all; for there they did acquit him of the reſidue, and the words are of one ſenſe.—WRAY *contra.* "As very a thief," and "a worſe thief," are all one.

Cro. Jac. 408. Hob. 228. 2. Bl. Rep. 791.

CASE 9.

Cole *againſt* Wall and Burnell.

The leſſee of a copyholder may maintain a ejectment at common law. Poſt. 535. 717.

EJECTIONE CUSTODIÆ of a ward and his land, And declareth, that the lord of the manor of *S.* had the cuſtody of the heir of his copyholder, and of his land, by the cuſtom there, until the heir came to his age of fourteen years, and that he might commit the cuſtody of his body and land to whom he pleaſed; and that one *Cl.* died ſeiſed of his land, being a copyholder of inheritance, and that the lord granted to him the cuſtody of the heir, being within the age of fourteen years, and the defendant ejected him. After verdict, it was alledged that an *ejectione firmæ* doth not lie of a copyhold eſtate.—And ſo it was ruled by the WHOLE COURT; and the judgment was ſtayed. And THE JUSTICES ſaid, that an *ejectione firmæ* doth lie of a leaſe made by a copyholder, but not for

4. Co. 26. a. Moor, 128. 272. 539. 569. Lit. 234. 2. Com. Dig. 530. 1. Bac. Abr. 490. Gilb. Ten. 213. 1. Term Rep. 600. 2. Term Rep. 198.

demiſe made by the lord of a copyhold, by copy of court roll. —But afterwards, *Trin.* 33. *Eliz.* this caſe was moved again; and alledged, that this action is an action upon the caſe, in nature of an *ejectione cuſtodiæ*; and not upon a grant by copy, but upon a grant at common law: and thereupon it was adjudged that the action lay.

COLE *againſt* WALL and BURNELL.

Guildeſlew *againſt* Ward.

CASE 9.

ACTION for theſe words: "Thou haſt ſtolen a load of hop-poles."—And it was ruled, that they were actionable; for it ſhall not be intended but they were cut down before; for otherwiſe they could not be ſaid hop-poles, or that he could otherwiſe ſteal them.

Words actionable.

Marſh and his Wife.

CASE 10.

MARSH and his wife, as executrix to *Wilkenſon*, brought a writ of error to reverſe an outlawry of felony againſt the teſtator. The error aſſigned was, That the *exigent* iſſued to *London*, and the ſheriff returned *quod exigi fecer' de comitatu in comitatum*, whereas it ought to be *de huſtingo in huſtingum*, for they have no counties; and for this cauſe it was held a manifeſt error. But the principal queſtion was, If error lieth by an executor to reverſe an attainder of felony in the teſtator?—COKE, and POPHAM *Attorney General*, alledged, that it cannot be maintained by an executor. Firſt, Becauſe a perſon attainted cannot have executor. Secondly, Executor cannot have error, but to reverſe a judgment in the perſonalty. But here the judgment is more high, for it is in the realty; and it may be miſchievous, for the executor may purſue faintly; and ſo the judgment may be affirmed, and bind the heir. Thirdly, Upon a writ of error to reverſe an attainder in felony, a *ſcire facias* ought to be to warn the lords mediate and immediate, which cannot be at the ſuit of an executor.—GAWDY conceived the action did well lie: for executors are privy to the judgment, and peradventure have all the loſs; for it may be that he that is outlawed had only goods, and no land. And as to the diſability alledged, that the teſtator was attainted, and ſo had no goods, nor can make an executor; it is not material in this ſuit, where they are to reverſe the attainder which doth diſable them, as 11. *Hen.* 4. *pl.* 64. But it doth not appear by that book, that he was outlawed for felony. And as to the faint purſuing of the action, the heir and executor, by reaſon of their ſeveral intereſts, may have ſeveral writs of error, as the tenant and vouchee may. And as to the *ſcire facias*, this needs not be in reſpect of the goods which are intended to be in the queen's hands, who is always preſent in court; and it is to be well conſidered, if it may be againſt the lords. But the clerks ſaid, a *ſcire facias* had been awarded againſt the lords.—WRAY. The diſability alledged is not to be objected againſt the executor, the ſuit being to reverſe it. And the caſe is to be well conſidered, for it may be very miſchievous againſt the lord. *Et adjournatur.*

An executor may bring a writ of error to reverſe the outlawry for felony of his teſtator. Poſt. 273. 558. 1. Roll. Abr. 912. 5. Co. 111. a. 1. Mod. 224. Owen, 147. 1. Leon. 325. 3. Dan. Ab. 14. Godb. 376. Salk. 60. 295. 2. Hawk. 654.

See the continuation of this caſe, poſt. 273.

CASE 11.

Garnons *against* Sir Henry Weston.

Trinity Term, 32. Eliz. Roll 877.

A fine pleaded of two manors *inter alia* is erroneous.—In an assise for a rent-charge against the feoffee of a tenant in tail, it is not necessary to aver the *life* of the tenant in tail. Ante, 87. 112. Post. 407.

ERROR upon a judgment given in an assise of a rent-charge of fifty pounds *per annum*; in which the title was, *John Vaughan* and *Anne* his wife (mother of the plaintiff in the assise) were seised of the manors of *Huntington-English* and *Huntington-Welsh*; and by fine, 18. *Eliz.* conveyed the manors *inter alia* to one *Whitney*, *per nomen* of two manors and of fifty messuages, and three hundred acres of land, &c. who by the same fine rendered the said rent of fifty pounds to them, and the heirs of *Anne*; and rendered the manors and tenements aforesaid to them for their lives, remainder to *Francis* their son in tail, remainder to the heirs of *Anne*; and that *John Vaughan* and *Anne* died, and that the rent descended to the plaintiff as son and heir of *Anne*; and that *Francis* entered as in his remainder, and thereof enfeoffed the said *Garnons*, who was tenant in the assise; and upon *nul tort*, *nul disseisin* pleaded; and found for the plaintiff, he had judgment to recover.

Plowd. 264. 431. Lut. 357. 1172. 1. Leon. 177. 281. 9. Co. 60. b.

Upon this error was brought.—First Error. That this fine is pleaded of these manors *inter alia*, so it may be intended that other lands passed in the fine: so an assise brought against him that was only tenant of the manors, is not good; for all the tenants of the land charged are to be named.—Second, Because the life of *Francis*, who was tenant in tail, was not averred.—Third, That the fine by the grant of the rent, and of the land to the same person, by the fine, is repugnant for the rent, and so void: for she cannot take the land and rent at the same time.—Fourth, When she had the remainder in fee of the land charged, the rent by this is extinct.—STEVENS *for the plaintiff*, and BOURCHIER *for the defendant*.

To the first, GAWDY and CLENCH held it to be error; for it being *inter alia*, the *per nomen* shall be intended of more than the two manors; and the terre-tenants of the residue not being named, it is not good.—FENNER *contra*.

To the second error, they all held the life of *Francis* needed not to be averred, for he had made a feoffment, and so the estate did continue.

A render of rent may be transposed by construction to make it effectual. Co. Lit. 312. b. 1. Leon. 255. Plowd. 34. 1. Salk. 337. 2. Com. Dig. 359.

To the third error, it seemed to them, that the rent granted by the same fine that the land was granted, was good; for the law shall marshal them, and the grant of both shall be good.—For first, The rent shall pass, and then it shall be as a purchase of the land by *Anne*, who was seised in fee of the rent; and the purchase of the remainder in fee shall not extinguish the rent, but it shall be *in esse*, during the particular estate; for by this the possession is only charged. And therefore GAWDY said, the difference is where one hath a rent service, and he purchaseth the remainder or reversion in fee, all the whole seigniory is extinct: for the entire tenancy is held, but the purchase of the reversion or remainder in fee doth not extinguish a rent charge; for it is chargeable upon the possession, for he shall avow as in land chargeable to his distress. *Et adjournatur.*

NOTA. It was discontinued by the death of *Sir Henry Weston*.

Page

Page *against* Faucet.

CASE 12.

Easter Term, 29. Eliz. Roll 121.

ERROR of a judgment given in *Lynne*.—The error assigned was, That the judgment was given at a court held there 16. *February*, 26. *Eliz.* and this day was *Sunday* (*a*), and it was so found by the examination of the almanacks of that year.—And it was ruled, that this examination was sufficient, and a trial *per pais* was not necessary, although it were an error *in fact*. And the judgment was reversed.

The almanack is good evidence to prove the day of the week by the day of the year; and a judgment recorded on a *Sunday* is vo'd.

Ante, 210. 1. Sid. 300. (*a*) Britton 134. Co. Lit. 135. a. 2. Inst. 264. Plowd. 265. 2 Salk. 626. Cro. Car. 602. W. Jones, 156. 5. Burrow, Swan v. Broom, 1596. Fost. 373. 5. Com. Dig. 523. 6. Mod. 41. Ld. Ray. 4. 281. 870. 1544. 1556. 2. Bl. Rep. 1006.

(*a*) See 29. Car. 2. c. 7.

Ward *against* Knight.

CASE 13.

Trinity Term, 30. Eliz. Roll 646.

ACTION ON THE CASE. And declares, that whereas *Lostocke* is an ancient village, and ancient demesne of the crown of *England*, and that the tenants and men of ancient demesne are to be quit of toll in all places, &c. and that he was an inhabitant and tenant there, and had brought his goods to *Yarmouth*; the defendant, not being ignorant thereof, had taken one cable of his goods for toll, &c. The defendant justified, for that *Yarmouth* is an ancient borough incorporate of bailiffs and burgesses, and had used from the time, &c. to have a water-bailiff there, and had used from the time, &c. to have toll of the tenants and inhabitants of *Lostocke*, for any of their goods brought there by sea for merchandise, and if it be not paid to distrain, &c. and the plaintiff, being an inhabitant of *Lostocke*, brought by sea twenty hundred weight of cable ropes to *Yarmouth* for merchandise; for which he demanded toll, and because it was not paid, took this cable rope *nomine districtionis*, &c. And upon this it was demurred; and it was argued by GOLDING *for the plaintiff*, and by HOBART *for the defendant*; and in the same term it was adjudged for the defendant.—THE COURT gave no public reason of it, but privately did agree between themselves for the substance of the matter; for WRAY said, it is not reason they should be discharged for merchandise; and so are the books. *Vide* 9. *Hen.* 8. *pl.* 25. 19. *Hen.* 6. *pl.* 66. 7. *Hen.* 4. *pl.* 43. *Fitz. N. B.* 228. a. *contra.*

A tenant in *ancient demesne* shall not be privileged from paying toll where he trades as a common merchant.

1. Roll. Abr. 311. Lut. 1146. F.N.B. 14.228. 2. Inst. 221. 1. Leon. 231. 2. Leon. 191. 1. Bac. Abr. 111. 2. Bac. Abr. 459. Dougl. 190.

Lovelace *against* Grimsden.

CASE 14.

Michaelmas Term, 32. & 33. Eliz. Roll 94.

ERROR of a judgment in the common pleas.—The error assigned was, That in trespass for taking of five horses, the defendant justifieth, for that one *Guillam* was amerced for blood-shed within his leet; and that he, and all those which were lords of the manor, from the time, &c. had used to distrain the beasts of any which came within the manor, and were in the possession of any man that was amerced in the leet for the amercement; and said, that these five horses were in the possession of *Guillam*; for which he did distrain them, &c. The plaintiff took issue, that they were not in the possession of *Guillam*. And upon this issue being joined, it was found for the plaintiff; and judgment given for him.—And it was assigned for error, that the issue was joined upon a thing merely void;

Qu. If the joining issue upon a void prescription is aided after verdict? Ante, 214. 2. Roll. Abr. 99. Salk. 173. 216. Ld. Ray. 90. 385. 1. Com. Dig. 331. 1. Stra. 397 Dougl. 683. 1. Ter. Rep. 151. 2. Ter. Rep. 758.

LOVELACE *againſt* GRIMSDEN.

void; and ſo no iſſue, and not aided by the ſtatute of *jeofails*.—And THE COURT agreed, that if there be no matter of bar in the plea, and the iſſue joined upon it, this is void, and not helped by the ſtatute of *jeofails*. But if the plea containeth matter of bar, and iſſue is joined upon a thing not material, this is aided by the 32. *Hen.* 8. c. 30. But here is no matter of bar; for the preſcription is agreed to be void; and then if no bar, no iſſue; and ſo can be no miſ-joining of iſſues, when there is no iſſue joined. And although the bar was ill, ſo that the plaintiff might have had judgment upon the bar; yet judgment being given upon the verdict, where no iſſue was joined, is erroneous.—And they all agreed, that the judgment ſhould be reverſed: but they would adviſe till the next term.

Poſt. 259. 455.

CASE 15.

Green *againſt* Penilden.

If the ſpiritual court refuſe a plea good at common law, a prohibition ſhall go.

PROHIBITION for ſuing for tithes, was prayed, for that he had pleaded in the ſpiritual court, that the ſaid *Penilden* was not lawful incumbent, but one *Taylor*; which plea they would not allow the pariſhioner to plead to the right of the incumbency.—And it was granted PER CURIAM; for he being the tenant of the land, may plead it, or elſe he ſhall be twice charged for his tithes.

3. Leon. 265. Cowp. 424. Dougl. 378. 1. Term Rep. 552.

CASE 16.

Man's Caſe.

If the ſpiritual court impeach a marriage without the Levitical degrees, a prohibition lies.

HE had married his wife's ſiſter's daughter (*a*); for which he was ſued before the High Commiſſioners. For although this was not prohibited within the Levitical degrees, yet becauſe degrees more remote are forbidden, they gave ſentence of divorce. And he grounded his prohibition upon the 32. *Hen.* 8. c. 38.—And a conſultation was prayed and granted, becauſe the prohibition is not to be, if it be not within the Levitical degrees: and here it was general, and therefore not good. *Vide Co. Litt.* 235.

Hob. 181. Vaugh. 207. & 304. Vent. 10. 15. 21. Eq. Caſ. 156. (*a*) Moor, 907. 4. Leon. 16. Vaugh. 248. 3. Lev. 364. 5. Mod. 168. 448. 1. Sid. 434. 2. Lev. 254. 2. Jones, 118. Ray. 464. Lut. 1077. 2. Inſt. 683. Noy, 29. Comb. 356.

CASE 17.

Stranſham *againſt* Cullington.

If the ſpiritual court attempt to try the boundaries of pariſhes, a prohibition lies.

PROHIBITION for ſuing for tithes, as proprietor of the rectory of *Cednam*. And ſhewed, that the tithes did grow *inter loca decimabilia* of that pariſh, as he ought to do, and that muſt be firſt proved. The defendant there pleaded, that the land was in the pariſh of *Aſhpole*, and that he had paid the tithes there; and upon this they are at trial, and upon this he had a prohibition; for the bounds of the pariſh are triable by the common law.

Ante, 178. 2. Roll. Abr. 291. 7. Co. 44. 3. Leon. 129. Cowp. 424.

Hear-ſay is ſufficient proof of a ſuggeſtion in prohibition, but *opinion* is not.

AND upon another prohibition for tithes, unity of poſſeſſion in the time of the abbot, at the time of the Diſſolution, was ſurmiſed; and proved it by the teſtimony of *Mr. Hynde* and another, who ſaid, they had ſeen a deed of appropriation of the parſonage to the abbot; for which they verily thought, that there was an unity of poſſeſſion at the time of the Diſſolution.—And this was ruled no proof, for it may be intended not to continue; and a conſultation was granted: but they ſaid, that hear-ſay ſhall be allowed for a proof.

Moor, 911. Palm. 377. Noy, 28. Kelly, 100. 4 Bac. Abr. 246. Dougl. 530.

Appethwart

Applethwart *againſt* Nortly.

CASE 18.

Michaelmas Term, 32. & 33. Eliz. Roll 472.

ASSUMPSIT. That in conſideration he promiſed the defendant to marry his daughter, he promiſed to give the plaintiff forty pounds: *et dicit in facto*, that he had married his daughter. Upon *non aſſumpſit*, it was found for the plaintiff: and it was alledged in arreſt of judgment, that no time or place was alledged of the requeſt.—*Sed non allocatur*; for it is in nature of a debt; and it is not here appointed to be upon requeſt, but otherwiſe it is of a thing collateral.

A promiſe in conſideration of marriage is good; and it is not neceſſary to ſtate in the declaration the *time* and *place* of the requeſt.

Ante, 74. 5. Com. Dig. 52.

Hopkins *againſt* Stapers.

CASE 19.

ASSUMPSIT. For that in conſideration he had ſold and delivered one thouſand couples of *Newland* fiſh *ad uſum proprium* of the defendant; and in conſideration he had ſhipped the ſaid fiſh, and agreed to tranſport them from *Briſtol* to *St. Lucar* in *Spain*, and to re-tranſport from thence the value of the fiſh to *London* or *Briſtol*, *ſecundum uſum mercatorum*, the defendant promiſed to pay to him 120l. upon the arriving of them *in portu St. Lucar*: and alledges *in facto*, that he arrived with them *ad portum St. Lucar*; and had re-aſported from thence goods, to the value of the fiſh at *London*, *ſecundum uſum mercatorum*. Upon *non aſſumpſit* pleaded, and found for the plaintiff,

A promiſe to pay on arrival IN ſuch a port, in conſideration of the plaintiff having ſold goods to the uſe of the defendant, and having *agreed* to tranſport them, is good, though the arrival is alledged AD the port, and tho' it is not ſtated to *whom* the goods were ſold, or *with whom* he agreed to tranſport them.

2. Ld. Ray. 1367.

EGERTON moved in arreſt of judgment,—Firſt, That it is no conſideration; for he ſaith he had ſold and delivered the fiſh to the uſe of the defendant, but ſheweth not to whom; by which it might appear the property was altered by the ſale.—Secondly, He ſaid in conſideration he agreed to tranſport, but ſaith not with whom; and it may be he agreed with a ſtranger, which doth not bind the defendant.—Thirdly, The promiſe is, he ſhall be paid when he arriveth *in portu St. Lucar*; and he ſhewed he arrived *ad portum*; which is no performance of the conſideration; and there is a difference between AD and IN, in conditions and conſiderations, though not in charges; and he relied upon 16. *Hen.* 7. *pl.* 9. 3. *Hen.* 4. *pl.* 9.—Fourthly, He ſhewed that he brought goods of that value to *London*, but ſheweth not to whom the property of the goods did belong; ſo they might be the goods of a ſtranger.

CURIA *contra in omnibus.* For to the firſt and fourth, they ſaid, it ſhall be intended that the goods were ſold and delivered to the defendant, and that he re-aſported the goods of the defendant; for it is *ſecundum uſum mercatorum*, which implieth both. To the ſecond, it ſhall be intended that he agreed with the defendant himſelf; and if it were with a ſtranger to his uſe, it is all one. To the third, AD and IN are of the ſame effect, and ſhall not be intended otherwiſe.—And it was adjudged for the plaintiff.

CASE 20.

Mead *against* Bygott.

Assumpsit will not lie for the value of *corn out of sacks* delivered under an attachment. Ante, 178. Post. 654.

1. Ro. Ab. 16. 26. Moor. 468. 2. Lev. 17. Cro. Jac. 103. 230. 652. 3. Leon. 236. 2. Wilf 133. 2. Burr. 924.

ASSUMPSIT. That whereas *J. Arnold* levied a plaint in the court of *Stepney* against *Stokes*, and a precept to attach the goods of *Stokes* was directed to the plaintiff, being bailiff there; and whereas he attached *Stokes* by two quarters of corn, and delivered them to the said *Arnold* to deliver them at the next court; the defendant assumed to save him harmless of the said corn. Upon *non assumpsit* pleaded, and found for the plaintiff, it was moved in arrest of judgment, that the consideration and promise was against law, and so void.—And so was the opinion of THE COURT. For, FIRST, Attachment cannot be of corn out of sacks (*a*).—SECONDLY, If it may, it is to be kept by the bailiff, and he ought not to deliver them out of his hand to the party plaintiff; and so the promise is against law, and void.

(*a*) See 9. & 10. Will. 3. c. 44. f. 74.

CASE 21.

Sir Richard Buckley *against* Wood.

Michaelmas Term, 31. & 32. *Eliz. Roll* 381.

To charge another with felony or piracy by bill in the star-chamber is actionable, for that court not having jurisdiction in either of these offences, the exhibiting such a bill was not a proceeding in the course of justice. Ante, 193. Post. 247.

S. C. 4. Co. 14. 3. Leon. 138. 1. Saund. 132. 1. Roll. Ab. 43 87. 4. Bac. Abr. 499. 518. 1. Term Rep. B. R. 111. 2. Term Rep. 399.

ACTION FOR WORDS. And declared, that whereas the defendant did exhibit a bill against him in the star-chamber, 30. *Eliz.* containing, *inter alia*, "that he was a noseler of thieves, "murderers, and pirates, &c." and recited a great part of the bill; that afterwards the defendant, at *Pausbery* in *Salop*, 7. *May*, 31. *Eliz.* said, "he would justify his bill to be true in every part, "&c." The defendant pleads, that the said seventh of *May* at *Westminster*, in the county of *Middlesex*, he was demanded by the lord chancellor, If his bill were true? and he said it was true in all points, ABSQUE HOC *quid dixit prædicta verba*, before or after the said day, *aliter vel alio modo*. And upon this the plaintiff did demur.—And *Mich.* 32. & 33. *Eliz.* TANFIELD argued, that the matter in the declaration is not sufficient to maintain the action; for it is for exhibiting the bill, and saying it was true in all points.—As to the first, For exhibiting a bill in course of justice, no action lieth; and if it be false, he shall be punished by costs given in the star-chamber, and not by action. And although the matters are not punishable there as felonies, yet they are punishable there as misdemeanours in him, who was a justice of peace, and a deputy-lieutenant of the county, and may be punished for abusing his office. 11. *Eliz. Dyer*, 285, *à scandalis magnatum*, for an action for forging a false deed brought against the *Lord B.* held not maintainable. And *Mich.* 27. & 28. *Eliz.* in this court, between *Tuthill and Osborne*, for exhibiting divers articles to the justices of peace at the quarter sessions, to have the good behaviour; although they were false, yet not actionable, for it is in a course of justice. So *Mich.* 8. & 9. *Eliz.* between *Stanley and Curson*, one was brought in by *subpœna ad testificandum*, and upon his oath declared matter of infamy against the plaintiff; yet he coming in by course of justice, and if he swear falsly, he may be punished for perjury, it was adjudged an action did not lie. And for the other words in justification of his bill, no action lieth: for it is not said, he shewed the contents of his bill, and so can be no slander; and for saying he had a bill depending against one, is no slander.—COKE *contra*. He agreed that

if

if his bill of complaint was in courſe of juſtice, no action did lie; but here he complains of divers matters which did not concern himſelf, but others, with which he had nothing to do; and it was the *Lord Clinton's Caſe*, 19. *Eliz.* and this is no ſtar-chamber matter, which toucheth his life.—And one *Leonard's Caſe* was diſmiſſed for the like cauſe, where one exhibited an *Engliſh* bill in the ſaid court, containing divers ſlanderous matters, an action upon the caſe did lie; and *Paſch.* 23. *Eliz.* in this court, between *Bowes and Stanley*, which was entered *Trinity Term*, 21. *Eliz. Roll* 559. this very cauſe was adjudged, where one exhibited a bill in ſtar-chamber, and after came into the country, and ſpoke of the matters of his bill at *Stafford*, and affirmed them to be true: and adjudged an action lay; for he ſhewed not his counſel, but publicly; and our declaration was framed upon that precedent.—*Et adjournatur. Vide poſt. page* 247. *Caſe* 7.

BUCKLEY *againſt* WOOD.

Chambers and Johns.

CASE 22.

THEY were indicted for incroaching upon the high-way, *et unum tenementum ibidem erectaverunt*; whereas it ſhould be *erexerunt*; for there is no ſuch *Latin* word as *erectaverunt*; and it is not ANGLICE did erect, which had been good.—And for this cauſe it was diſcharged.

Indictment quaſhed for falſe Latin. Ante, 137. 5. Co. 121. Keil. 100. 1. Sid. 318. Cro. Jac. 129. 2. Hawk. 340.

Penhallo's Caſe.

CASE 23.

HE was indicted upon the 5. *Edw.* 6. c. 4. for drawing his dagger in the church of *B.* againſt *J. S.* and doth not ſay (according to the ſtatute) to the intent to ſtrike him; and for this cauſe it was void.—But then it was moved, if this were not good as for an aſſault, that he might be fined upon it.—But PER CURIAM, it is void in all: for being indicted upon the ſtatute, it is void as to an offence at the common law.

Indictment on a ſtatute muſt conclude *contra formam ſtatuti*; and cannot be made good for an offence at common law. Poſt. 307. 319. 494. 697. 1. Salk. 212. 2. Hale, 171. Caſ. Temp. Hard. 193. 4 Leon. 49. Noy, 171. Sed vide 2. Hawk. 356. *contra*. Cowp. 648. Dougl. 441.

Wing *againſt* Harris.

CASE 24.

EJECTIONE FIRMÆ. Upon a ſpecial verdict, *Henry* the eighth was ſeiſed of certain lands called *Burnels*, and of the ſite of the hoſpital of *St. Johns* in *Wells*. He demiſed *Burnels* to *Aylſworth* for twenty-one years, and afterwards granted the reverſion of it *(inter alia)* to *the biſhop of Wells* in fee; and afterwards the biſhop granted thoſe lands *inter alia* to *Edward* the ſixth, which did deſcend from him to queen *Mary*; and afterwards queen *Mary* demiſed the lands to the ſaid *Aylſworth* for ſixty years, not reciting the firſt leaſe made to *Aylſworth*.—This caſe was argued *Mich.* 32. & 33. *Eliz.* and *Paſch.* 33. *Eliz.* adjudged, that the leaſe for ſixty years was void, for non-recital of the leaſe for twenty-one years: for although by the taking of the ſecond leaſe the firſt was drowned, yet at the inſtant time of the taking of the ſecond leaſe it was *in eſſe*; and therefore ought to have been recited, eſpecially being a leaſe upon record. But of a leaſe by matter in fact, they agreed there need be no recital: the objection againſt it was, becauſe the reverſion had been conveyed to the biſhop: ſo in his time the leaſe might have determined without

A grant for life from the crown to a leſſee for years of the ſame eſtate, muſt recite the leaſe for years, or the grant is void. 2. Ro. Ab. 290. Moor, 415. 3. Leon. 242. Cro. Car. 198.

Wine *against* Harris.

any matter of record: and for this cauſe, when it came to the queen's hand, it need not be recited.—But THE COURT held, forasmuch as *Aylworth* was the perſon that was the leſſee, and might well have knowledge of it, if it had been ſo done, and no ſuch thing is done, when the reverſion was in the queen's hands, it is as if it had never been granted from the crown: and for this cauſe it was adjudged accordingly.—There were other points in the caſe, but it was reſolved only upon this.

Easter Term,

33. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*

Sir William Periam, *Knt.*
Hugh Wyndham, *Eſq.* } *Juſtices.*

Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Case 1.

The Warden of All-Souls College in Oxon *againſt* Tanworth.

If feiſin be pleaded by the warden and fellows of a college, it need not ſay *jure collegii*, &c. &c. Plowd. 102. 503. Leon. 153. And. 272. 2 Lev. 68. Vent. 223. Cro Car. 215.

A WRIT OF RIGHT was brought by *Cuſtos et Collegium* of *All-Souls* in *Oxon*. The writ was, "*quòd clamant tenere de nobis in* "*liberam puram et perpetuam elemoſynam, et quòd clamant eſſe jus et hære-*"*ditatem ſuam, &c.*"—Exceptions were taken to the writ,—Firſt, It ought to be "*in liberam eleemoſynam*," and not "*puram et perpetuam.*"—Secondly, It ought to be *eleemoſynam* with a double *ee*.—Thirdly, They ought not to ſhew any tenure in ſpecial, but generally *tenent de nobis*.—Fourthly, For that they ſay not *in jure collegii*.—*Sed non allocantur*. For the firſt is but ſurpluſage, and not material. The ſecond, the common courſe is ſo, and therefore it is good. Thirdly, They did well to expreſs the tenure; for otherwiſe it might be taken for a tenure *in capite*, which they do well to avoid. Fourthly, When the writ is brought by *Cuſtos et Collegium*, this cannot be but *in jure collegii*, as in their incorporation; for they have no other capacity; and the precedents are both ways.

Case 2.

Perrot *againſt* Auſtin.

A teſtator cannot bind his executor where he is not bound himſelf. Co. Lit. 386. a.

THE caſe was, *A.* covenanteth with *B.* to put his ſon an apprentice to *C.* otherwiſe that his executors ſhall pay *B.* twenty pounds. *A.* doth not put his ſon an apprentice to *C.* and dieth; *B.* brings debt againſt the executors of *A.*—And it was reſolved by THE COURT, that it lieth not for two cauſes.—Firſt, It cannot be a debt in the executor, where it was not debt in the teſtator: and if one covenants to pay ten pounds, debt lieth againſt him or his executors, as 40. *Edw.* 3. and 28. *Hen.* 8. *Dyer*, are: but if he doth covenant that his executors ſhall pay ten pounds, an action lieth not againſt them.—The ſecond reaſon. The firſt part of the deed ſounds in covenant, and the ſecond part ſhall be of the ſame nature and condition. *Quære* of this reaſon?

Vide 3. Burrow, 1383. Ld. Mansfield's opinion of this caſe. 3. Vern. 322.

Oglethorp *againſt* Hyde.

Case 3.

To covenants ſome negative, and ſome affirmative, performance pleaded generally is good, except upon demurrer; but performance of disjunctive covenants muſt be ſpecially pleaded.

DEBT upon an obligation to perform covenants. The defendant pleadeth generally performance of covenants, where ſome are in the negative, and ſome in the affirmative.—It was held, that this is but matter of form, and is aided by the ſtatute of 27. *Eliz.* except the party ſheweth it for cauſe of his demurrer, that ſome of the covenants are in the negative, and ſome in the affirmative; for the Court ſhall adjudge according to the truth of the matter. But if any of the covenants are in the disjunctive, it is otherwiſe; for the Court cannot know which of them in the *disjunctive* he hath performed.

Ante, 62. Poſt. 691. 253. Co. Lit. 303. b. 8. Co. 133. b. Cro. Jac. 560. 1. Lut. 581. 1. Leon. 311. Allen, 72. Style, 63. 1. Bac. Ab. 548. Ld. Ray. 597. Cowp. 578.

Aſcue *againſt* Fuljambe.

Case 4.

An iſſue whether a *ſtatute merchant* was duly ſealed ſhall be tried *by jury*; and an *audita querela*, and not error, lies upon the judgment; in which if the *conuſee* has ſued execution, he cannot ſay it is a *ſtatute-ſtaple*. Poſt. 319. 810. 1. Leon. 229. 233. Owen, 142. Dyer, 35.

AUDITA QUERELA, becauſe execution was ſued upon a ſtatute acknowledged in the city of *Lincoln* as a ſtatute-merchant, which had but one ſeal, where it ought to be with two ſeals, according to the ſtatute *de mercatoribus*, 13. *Edw.* 1. And iſſue was joined, if it were ſealed with a ſeal of two pieces, and tried for the plaintiff by a jury of the city of *Lincoln*.—It was alledged in arreſt of judgment, that the iſſue ought to be tried by the certificate of the mayor, and not *per pais*. CURIA *contra*. For this is a matter of fact, and no parcel of the record.—The ſecond cauſe. *Lincoln* is in the margent, ſo it ſhall be intended to be tried by *pais* of the county of *Lincoln*, whereas it was and ought to be tried by a *venue* of the city.—Thirdly, A writ of error lieth upon this matter, and not an *audita querela*, 18. *Edw.* 3. 25. where error is in ſuing execution. But it was held clearly, that where a ſtatute is erroneouſly acknowledged, as here, no writ of error lieth, but an *audita querela* (*a*); for this is no record. But if it be well acknowledged, and removed hither, and execution is here erroneous, error lieth thereof.—Fourthly, This ſhall be taken as a ſtatute acknowledged according to the ſtatute of *Acton Burnell* of 11. *Edw.* 1. and not according to the ſtatute 13. *Edw.* 1. *de mercatoribus* (*b*); ſo it is good for the goods and body. CURIA *contra*. For the conuſee having ſued execution upon it as a ſtatute-merchant, he ſhall not now be received to ſay, but that it was acknowledged according to that ſtatute for which the plaintiff had judgment (*c*).

(*a*) See 2. Bac. Abr. 196. 333. in notis. (*b*) See 8. Geo. 1. c. 25. (*c*) The judgment was affirmed on a writ of error in the king's bench. Vide poſt. 319.

Brunkhorne's Caſe.

Case 5.

If the principal pay the ſum recovered, the bail may plead it as performance of the recognizance. Poſt. 238. 1. Ro. Ab. 335. 2. Lev. 212. 1. Mod. 24. 1. Vent. 49. 2. Bac. Ab 218.

SCIRE FACIAS againſt *Brunkhorne* and others, bail for one *Parker*. Their recognizance was, "if *Parker* were condemned, "that he ſhall pay the debt within ſuch a time, or render his "body to priſon." *Parker* being condemned, and not rendering his body to priſon, *ſcire facias* was brought againſt them. Upon this recognizance they pleaded, that *Parker*, ſuch a day before the day in the recognizance, paid the money.—And this was held a good plea without a ſpecialty; for the recognizance, as to them, is but as an obligation with a condition, upon which they might well plead performance. *Vide contra, Ordeway's Caſe, antea* 132. But the

BARNEBORNE'S CASE. the party in the *scire facias* upon this recovery cannot plead it, except satisfaction be acknowledged upon record; for by *nude* payment he shall not avoid a matter of record.

CASE 6.

Leonard *against* Bacon.

"*Non tenure*" pleaded after a feoffment to avoid a *formedon* is fraudulent. Savil. 126. 1. Mod. 181. 2. Com. Dig. 375. 2. Bac. Ab. 603, 604. Cowp. 434. Dougl. n. (1.) 463.

FORMEDON. The tenant pleads "*non-tenure*;" and upon this they were at issue: and it was found, that before the writ purchased, the tenant enfeoffed divers persons, to the intent to defraud them which had cause of action for the same lands, and notwithstanding he took the profits.—And this verdict was adjudged for the demandant, for the feoffment was void against him by the statute of 13. *Eliz.* c. 5.

See 25. Edw. 3. c. 16.

CASE 7.

Hayes *against* Allen.

In what manner a messuage shall be recovered against a *discontinuee*, who has built a new house, part on his own land and part on the land discontinued. S. C. 1. And. 205. Post. 286. 290. 611.

SUR CUI IN VITA of a messuage. The parties being at issue, it was found by verdict, that a discontinuance being of the messuage, the discontinuee pulls it down, and erected a new house on part of the land discontinued, and part upon his own land adjoining; and, If upon this matter the writ was well brought of the intire messuage, or that it was to have been brought of such part of the house, and how the judgment should be in this case? was the question.—After argument, it was adjudged for the demandant, that the writ was well brought by the name of the whole messuage, and there needed not *forepriſe*; for the action is to be brought as the land is at the time of the bringing the action, and there is no other form of writ in the Register but for the intire house: and it was adjudged, that the demandant shall recover. But the judgment was entered specially, that the demandant should recover *messuagium prædict' scilicet*, so much in length, and so much in breadth, according to what the verdict found upon the land in demand. *Vide Co. En.* 642. the record of this case. *V.* 39. *Hen.* 6. 8. 33. *Edw.* 3. "*Entries*," 80. 11. *Hen.* 4. "*Dower*," 175. & 179. 16. *Edw.* 3. "*Brief*," 650. 32. *Hen.* 8. *Dyer*, 47. *F. N. Br.* 192. —NOTA, That *Mich.* 33. & 34. *Eliz. Roll* 111. a writ of error was brought, and the error was assigned in the very point adjudged: and after argument, the judgment was affirmed.

1. BUT. 138.

CASE 8.

Clark *against* Penruddock.

Exceptions to a writ of *quòd permittat*.

THE case adjudged, as it is reported 5. *Co.* 100. b. against the opinion of ANDERSON.—But two exceptions were taken to the writ.—First, That it did not warrant the count, for the writ was *prosternere domum*, and the count was *prosternere penthouse*; and so variant, and not warranted by the writ.—*Sed non allocatur*; for so is the form in the Register, *prosternere domum*, where only part is to the nusance.—Second exception, That the writ is *modo querentis*, but sheweth not how the messuage came to him; for if he cometh to it *in le post*, as by disseisin, there is no colour for him to have remedy. *Sed non allocatur*; for the count maketh it sufficiently certain.

By 5. Geo. 1. c. 13. judgment shall not be stayed, *after verdict*, for any variance between the writ and declaration.

Atkinson

Atkinſon *againſt* Atkinſon.

CASE 9.

ACTION for words: "I have ſerved thee with the queen's "letter, for ſtealing of goods out of my mother's houſe."— Upon not guilty pleaded, and found for the plaintiff, it was adjudged, that the action did not lie; for the defendant doth not ſay *expreſsly*, that he had ſtolen the goods, but that he had ſerved him, &c. which may be, though he did not ſteal them; ſo it is only a charge by implication.—PERIAM cited a caſe of one *Nowel*, a clerk of this court, where the words were, "Thou waſt cubbed up for "forging of writs;" and ruled no action lay.

Slander muſt be *expreſsly* alledged.
Cro Car. 268.
Cro. Jac. 154.
Hob. 177.
2. Wilſ. 300.

Bighton *againſt* Sawle.

CASE 10.

IT was agreed by THE COURT, that where judgment was given upon demurrer, that after a writ of inquiry of damages is returned, before a new judgment given upon it, the defendant may alledge any matter in arreſt of judgment.—But PERIAM ſaid, this is where the damages are the principal; but in debt, where the debt is the principal, and he hath judgment to recover, and a writ of inquiry of damages, it is otherwiſe.—And ANDERSON ſaid, that in *Pratt and Ruſſel's Caſe*, where a judgment was given in the queen's bench, before the 27. *Eliz.* c. 8. and the writ of inquirv of damages was returned after the ſtatute, and then the judgment was given upon it; that this judgment, by the opinion of all THE JUSTICES, was reverſable by force of that ſtatute.

Matter may be alledged in arreſt of an interlocutory judgment.
Poſt. 914.
11. Co. 42. a.
1. Leon. 309.
2. Mod. 265.
Salk. 17.

Owen Joans *againſt* Elizabeth Hoel.

CASE 1.

Eaſter Term, 33. Eliz. In the Exchequer.

Trinity Term, 32. Eliz. Rot. ultimo.

EJECTIONE FIRMÆ of ſeven cloſes, one called *Greenmead*; and ſo gave to the other ſeveral names. After verdict found for the plaintiff, upon not guilty pleaded, it was moved in arreſt of judgment, that he ought to count of a certain number of acres; for now no writ of execution can be awarded to put him in poſſeſſion; and ſo it is in every *præcipe* for land.—CURIA *contra*. That is well enough; for when a name is given to every cloſe, although the content of the acres are not mentioned, *viz.* ſo many of land, ſo many of paſture, &c. it is ſufficient, though it were more formal to expreſs the acres; and it is aided by the ſtatute of *jeofails*, and the Court is aſcertained of the truth.—And POPHAM, *Attorney*, ſaid, he had known it thrice ſo adjudged.—And the plaintiff had judgment.

3. Lev. 96. 1. Burr. 623.

In ejectment for land it is not neceſſary to ſtate the quantity of acres, if it is otherwiſe ſufficiently deſcribed.
See poſt. 339. 854.
11. Co. 55. a.
Cro. Jac. 435.
Cro. Car. 573.
1. Salk. 254.
Carth. 204.
4. Mod. 97.
2. Bac. Abr. 169.

Trinity

Trinity Term,

33. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt.* *Attorney General.*
Sir Thomas Egerton, *Knt.* *Solicitor General.*

CASE 1.

Vander Plunken *againſt* Griffith.

To cauſe another to be arreſted in the name of a perſon who has not conſented to ſuch arreſt, is not within 8. *Eliz.* c. 2.

2. Inſt. 444. 1. Saund. 228. 1. Raym. 135. 2. Mod. 51. Ld. Ray. 381.

ACTION upon the 8. *Eliz.* c. 2. for cauſing him to be arreſted in the name of *Baildree*, and three others, where the three others never conſented to it; and that this was for vexation, none of them having cauſe of action. The defendant pleaded not guilty; and found for the plaintiff.—And it was moved in arreſt of judgment, that this caſe is not within the ſtatute: for if he cauſeth one to be arreſted in the name of one of the plaintiffs, though the other do not aſſent, he is out of the ſtatute; for he hath colour to do it, and it cannot be ſaid to be maliciouſly done; for one of the parties may give him ſufficient authority to ſue.—To which it was anſwered, that then the ſtatute ſhall be defeated; for then one that is a beggarly perſon, and cannot pay coſts, yet peradventure may conſent that one ſhall ſue in his name, and of the others, eſpecially in an action of treſpaſs, but otherwiſe in an action of debt.—And of this opinion were WRAY and GAWDY: but THE OTHER JUSTICES *contra*, that it is out of the ſtatute, for the reaſon given before.

A public ſtatute need not be recited; but if the party undertake to do it and recite it falſely, it will be fatal. 1. Bulſ. 218. Ld. Ray. 382. 1. Sid. 214. 2. Sid. 162. Poſt. 245. Ante, 57.

But an exception was taken to the declaration, that the ſtatute was miſ-recited; for the ſtatute is, "If any perſon ſhall voluntarily procure any other to be arreſted, to anſwer in the court of, &c. where any privilege is uſed to hold plea in actions perſonal;" and it is recited, "where any privilege is uſed to hold plea in any action," omitting "perſonal;" ſo, as recited, it refers to all actions.—And ſo was the opinion of THE COURT, that it was a plain miſ-recital: and though the ſtatute is general, and need not to be recited, yet when he reciteth it falſely, it makes the plea ill. And for this cauſe principally it was adjudged, that the plaintiff *nihil capiat per billam.*

Cro. Car. 229. 232. 2. Mod. 99. 4. Bac. Abr. 658, 659. 2. Hawk. 349. 351.

CASE 2.

Tedcaſtle *againſt* Holliwell.

Michaelmas Term, 32. & 33. Eliz. Roll 423.

On a bond conditioned to pay *within one month after notice*, the value of ſuch goods as an apprentice ſhould miſ-ſpend; proof muſt be given to

DEBT upon an obligation. The condition was, That whereas *J. D.* hath bound himſelf to be an apprentice with the plaintiff, if the ſaid *J. D.* during his apprenticeſhip, or any other by his aſſent or procurement, take or riotouſly miſ-ſpend any goods of the plaintiff; if then the defendant, within one month after notice thereof given to him, ſatisfy and pay to the plaintiff for all ſuch ſums of money or wares, &c. ſo taken or notoriouſly ſpent by the obligor, before action brought, that the goods have been miſ-ſpent. Ante, 205. Poſt. 470.

the ſaid *J. D.* or any other by his procurement or conſent, the ſame being ſufficiently proved, that then, &c. The defendant, *proteſtando* that the ſaid *J. D.* nor any perſon by his conſent (not making mention of procurement) had not taken nor riotouſly ſpent any goods of the plaintiff, &c. for plea ſaith, that the plaintiff had not ſufficiently proved before action brought, that the ſaid *J. D.* had taken or riotouſly ſpent any goods of the plaintiff: upon which plea the plaintiff demurred.—It was argued by DANIEL *for the plaintiff*, and by GODFREY *for the defendant*. And the queſtion only was, If the proof ſhould be in this action, or by any other means before; and what proof ſhall ſerve? *Vide* 10. *Edw.* 4. 11. 7. *Rich.* 2. *Bar.* 241. and *Scroggs' Caſe*, *antea*, *Mich.* 32. & 33. *Eliz.*—GAWDY and FENNER, *Juſtices*, conceived the proof muſt be before the action brought by ſome collateral means (but ſaid not what means or in what manner); for the defendant is not to pay, but ſo much as is taken and proved to be taken or ſpent, &c. and this within one month after notice; ſo he is to have time to pay after proof made, and notice given; and this cannot be in this action.

TESCASTLE *againſt* HOLLIWELL. 2. Roll. Ab. 594. Hutt. 98. Hob. 66. 1. Bl. Rep. 387. Dougl. 214. 384. 1. Term Rep. 287. 291.

But much was not ſpoken to it, for there was an incurable fault in the pleading: for he for plea ſaith, that the plaintiff had not made proof that *J. D.* took or riotouſly ſpent, &c. but ſpeaks not, that any other by his conſent or procurement; and ſo doth not anſwer to the ſubſtance of the condition; and for this it was held clearly ill: and for this cauſe it was adjudged for the plaintiff, although it was ſaid, *qui per alium facit per ſeipſum facit*; ſo the plea extends to it. But THE COURT *contra*. But for the matter in law, they ſaid it was ſtrong againſt the plaintiff.

A plea to debt on bond, muſt anſwer the whole ſubſtance of the condition. Poſt. 239.

Salteſton and Offely *againſt* Payne.

CASE 3.

THE plaintiffs, ſheriffs of *London*, brought an action upon the caſe, for that the defendant, being in execution under their cuſtody for 53l. at the ſuit of *Spicer*, had eſcaped, the ſaid *Spicer* not ſatisfied; for which they were compelled to pay the debt. The defendant pleads, confeſſing all the matter, and that after this eſcape *Spicer* had acknowledged ſatisfaction of record. Upon this it was demurred.—And THE COURT held clearly, that an action upon the caſe lieth againſt a priſoner for an eſcape out of execution, to the intent to make the ſheriffs chargeable with the debt; and ſo adjudged between *Hill and Holt*, *quod vide antea*, 53. that the ſheriff ſhall have an action, *quia onerabilis*. *Fitz. N. Br.* 130. b. 13. *Hen.* 7. *pl.* 2. 14. *Hen.* 7. *pl.* 1. But here, becauſe the defendant is to be charged, for that the plaintiffs are chargeable with the debt, and not otherwiſe; and the defendant hath pleaded ſatisfaction acknowledged upon record, which may be by his means, which is not denied, for otherwiſe the plaintiff might have ſhewn the ſpecial matter by replication; and ſo the plaintiffs are to have no loſs, and ſo no cauſe of action; it was adjudged for the defendant, and the plaintiff *nihil capiat per billam*.

A ſheriff who is chargeable with the debt upon an eſcape, ſhall have an action for the miſ-ſeaſance againſt the priſoner; but if ſatisfaction be entered, he muſt *reply* that it was not made by the defendant, or it will be a bar to his action. Godb. 125. 1. Leon. 237. 3. Co. 52. b. Moor, 569. 660. Lut. 64. Cro. Car. 109. Cro. Jac. 486. 1. Mod. 660. Imp. Sh. 191. 3. Burr. 1349.

See 8. & 9. Will. 3. c. 27.

Mountney *againſt* Andrews.

CASE 4.

SCIRE FACIAS upon a judgment in debt. The defendant pleads, that upon a *fieri facias* directed to the ſheriff of the

To a *ſcire facias* on a judgment, the defendant may plead execution on a *fieri facias* for the ſame debt, without ſhewing that the writ is returned. Ante, 209. 233. Poſt. 390. 597.

MOUNTNEY *against* ANDREWS.

county of *Leiceſter*, for levying the debt, he by force of it took divers ſheep of the defendant's for the debt, and yet detaineth them.—And this was ruled a good plea PER CURIAM; although he doth not alledge that the writ is returned, and although the writ is conditional, *ita quòd habeas denarios, &c.* for the plaintiff hath his remedy againſt the ſheriff, and the execution is lawful, which the defendant cannot reſiſt. *Vide antea, Rook's Caſe, Mich.* 32. & 33. *Eliz. fol.* 208. 9.

5. Co. 90. Moor, 468. 4. Leon. 194. 1. Sid. 29. 1. Salk. 318. 322. 6. Mod. 293. 299. 1. Roll. Ab. 893. Dyer, 98. B. R. H. 348. 2. Ld. Ray. 1072. The caſe of Cooper v. Chitty, 1. Burrow, 20. to 38.

CASE 5.

Allen *againſt* Hill.

Michaelmas Term, 32. & 33. *Eliz. Roll* 54.

If a houſe be deviſed to *A.* for life, "PROVISO, "*If ſhe departs* "*thereſrom ſhe* "*ſhall have the* "*rent*," the life eſtate is determined by her *departure*, and till the entry of him in remainder ſhe continues tenant at ſufferance only.

FJECTIONE FIRMÆ, for a houſe in *Cornhill, London.* Upon a ſpecial verdict the caſe was, *Fr. Benſon* being ſeiſed of the houſe in fee, 4. *Eliz.* deviſed it to *Agnes* his wife for life; and after to the heirs of his body, the remainder to *Th. Benſon* his brother in fee: "PROVISO, that if the ſaid *Agnes* clearly departs out of "*London*, and dwell in the country, that then ſhe ſhall have a "rent out of the ſaid houſe, &c." And found further, that *Francis* died without iſſue, and that *Th. Benſon* died, and that *R.* is his heir; and that afterwards, 15. *Eliz. Agnes totaliter* departed from *London*, and went to *Milton* in *Suffolk*. And after the ſaid *R.* before entry made by him and the executor of *Francis* releaſed to *Agnes*; and afterwards entered, and let to the plaintiff; and that *Agnes* married one *Huggins*; and the defendant entered by his commandment.—The ſubſtance of the matter was, If this PROVISO doth determine the eſtate before entry? for if ſo, ſhe was tenant at ſufferance, and the releaſe could not inure to her eſtate: for it was agreed, it was a good PROVISO to make her eſtate to determine; although there be no words "*to ceaſe*," or "*that it ſhall be void*;" but being in a will, it is implied in the words, "*that then ſhe ſhall have a rent*;" which cannot be, if her eſtate be not determined.—THE JUSTICES ſaid, ſhe is but tenant at ſufferance; for if the deviſe had been expreſs, that if ſhe doth ſuch an act her eſtate ſhall ceaſe; after ſuch a act done, though ſhe continue in poſſeſſion, and dieth, this is no freehold in her; and here is as much in ſubſtance. And WRAY ſaid, it was held at an aſſembly of all the Juſtices, that if tenant *pur auter vie* continue in poſſeſſion after the death of *ceſtuy a que vie*, he is but tenant at ſufferance, and his diſcent ſhall not take away an entry; which GAWDY agreed, and that 18. *Edw.* 4. *pl.* 25. is not law.

Cro. Jac. 170. See Taylor v. Hord, 1. Burr. 60. to 127.

A *venire facias de novo* ſhall not be awarded where judgment may be given on the verdict.

But there was a default in the verdict; for it was found that ſhe *totaliter* departed from *London*, and went to *Milton* in *Suffolk*; but it was not found that ſhe dwelt out of *London*; and this is part of the condition: and this not being found, it is not found that the condition is broken; and then, notwithſtanding any matter found, the entry of the defendant is lawful. And it was moved, that as to it a *venire facias de novo* ſhould iſſue to examine this point better, if ſhe dwelt in the country; for it was ſaid in this point, the verdict was not well examined.—But THE COURT held, that the verdict is full, upon which a judgment might be given, and then no *venire facias de novo* is to be awarded; for it is found for the defendant, when it is not found that the condition is broken:

8. Co. 65. Cro. Jac. 210. Barnes, 478. Strange, 513. Dougl. 362. 378. 2. Wilſ. 367. 377. 1. Ter. Rep. 152.

and for this cauſe only it was adjudged for the defendant.

ALLEN *againſt* HELL.

But then it was objected, that the life of *Agnes* was not found (*a*), and then the defendant cannot enter.—FENNER ſaid, it ſhall be intended ſhe is living; for the jury did not doubt of it; for they find, that if his entry upon the matter found is lawful, that he is not guilty: ſo they doubted of nothing but that point; and ſo it was adjudged in 28. *Eliz.* in this court (*b*).—And judgment was, *quòd querens nihil capiat per billam.*

In what caſe the court will intend and ſupply a fact not expreſsly found in a ſpecial verdict.

Jenk. Cent. 262. 5. Co. 97. a. Hob. 55. 262. Cro. Jac. 64. 442. Cro. Car. 458. Vaugh. 150. Salk. 249. 1. Term Rep. 141. (*a*) See 21. Jac. 1. c. 13. (*b*) Scovel v. Cable, Moor, 268.

Simonds *againſt* Lawnd.

CASE 6.

TRESPASS. The jury found a ſpecial verdict, that *R. Lawnd*, father of the defendant, was a copyholder of the land in fee, and ſurrendered it to the uſe of the defendant in fee, upon condition he ſhould perform the covenants in ſuch an indenture. The defendant after admittance ſurrendered the land to the uſe of the plaintiff in fee, upon condition, if the defendant paid ten pounds, the ſurrender to be void. The defendant neither paid the ten pounds, nor performed the covenants in the indenture. The father enters, and dieth ſeiſed; and it deſcends to the defendant, and he enters, upon whom the plaintiff enters. The queſtion was, If this entry were lawful?—And adjudged it was not; for by the entry of the father, both the ſurrenders are defeated; ſo the defendant may *confeſs and avoid* what was done to the plaintiff.—And it was adjudged for the defendant.

A ſurrenderor who re-enters for a condition broken ſhall be reinſtated in his former eſtate.

Co. Lit. 202. 2. Rull. Ab. 474. 1. Wood's Con. 14. Gilb. Ten. 277. 1. Bac. Abr. 471, 472. 1. Term Rep. 600.

Johns *againſt* Gittings.

Hilary Term, 32. *Eliz. Roll*

CASE 7.

ACTION FOR WORDS: "Thou haſt played the thief "with me, and haſt ſtolen my cloth, and half a yard of "velvet." The defendant pleaded, that the plaintiff was his taylor, and that upon the day of, &c. he delivered to him a yard and half of velvet, to make him a pair of hoſe, and he made them too ſtrait: *ratione cujus*, he ſpoke theſe words, "Thou haſt ſtolen "part of the velvet which I delivered you," ABSQUE HOC that he ſpake any words *aliter vel alio modo*. Upon which the plaintiff demurred; for the plea and traverſe do nôt confeſs any words of ſlander, and then the traverſe is merely void. *L.* 5. *Edw.* 4. *pl.* 26. 9. *Edw.* 4. *pl.* 15. 37. *Hen.* 6. *pl.* 34. 22. *Hen.* 6. *pl.* 17.—And of this opinion was THE COURT: but a manifeſt fault was alledged in the plea, for he did not anſwer to the words, "Thou haſt "ſtolen my cloth," ſo it is vicious, and cannot be cured. And it was adjudged for the plaintiff.

A ſpecial plea muſt *traverſe* and *anſwer* the whole of the declaration.

Aſte, 153. 237. 4. Bac. Ab. 517. 5. Com. Dig. 222.

Gaſtrell *againſt* Townſend.

CASE 8.

ACTION FOR WORDS: "Thou haſt ſought the blood of "my huſband, and waſt his death; for if thou hadſt been an "honeſt woman, he had been alive yet:" and avers *in facto* that her huſband was killed.—It was moved, the action lieth not; for it is not ſaid ſhe did any unlawful act; and it was cited to be adjudged *Mich.* 18. & 19. *Eliz.* that for theſe words, "Thou wert the "death of *J. S.*" action lieth not, for it may be by grief.—But it was ruled here, that the action lieth, for they ſhall be taken to be ſpoken in *malam partem*: and it was adjudged for the plaintiff.

Words actionable.

CASE 9.

Elſden and Page *againſt* Barnes.

Hilary Term, 33. *Eliz.* *Roll* 519.

Outlawry reverſed for a literal variance between the writ and the exigent. Ante, 50. 2. Leon. 120. Cro. Jac. 576.

ERROR to reverſe an outlawry in treſpaſs.—Firſt, The plaintiff in the original was named *Barnes*, and in the exigent *Bernes*; ſo an *e* for *a*. GAWDY held it no error, becauſe it was in the name of the plaintiff. FENNER *contra*; for the exigent iſſued at the ſuit of a wrong perſon.—Second, The original was *blaba ſua*, and the exigent was *blada*. And this was held a plain variance, and the outlawry reverſed.

CASE 10.

Downes *againſt* Savage.

Trinity Term, 32. *Eliz.* *Roll* 772.

Conuſance of a fine taken by *one* where the *dedimus* is to two, is erroneous.

ERROR to reverſe a fine in *Cheſter*. The conuſance was taken of it by one, and the *dedimus poteſtatem* to him and another jointly: and this was erroneous.

2. Bac. Abr. 528. 538. Cruiſe on Fines, 80.

CASE 11.

Aſhbrooke *againſt* Snape.

If an obligor promiſes to pay, an *aſſumpſit* will lie. Poſt. 242. 283. Cro. Car. 415.

IT was agreed by all THE JUSTICES, that if one be bound in an obligation, and afterwards promiſeth to pay the money, *aſſumpſit* lieth upon this promiſe; and if he recover all in damages, this ſhall be a bar in debt upon the obligation.

Cro. Jac. 110. Yelv. 84. Cowp. 128.

CASE 12.

Barnes *againſt* May.

In *aſſumpſit*, if the day and place of the requeſt be alledged in one of the counts, it is enough.

ASSUMPSIT. That whereas he ſold to the defendant a pack of wool for twenty pounds, to be paid at a day certain, and *licèt requiſitus*, *viz.* at ſuch a day and place, &c. he had not paid it; and that he ſold to the defendant another pack of wool for ten pounds, to be paid when required; *et licèt ſimiliter requiſitus*, *&c.* without alledging day and place: yet adjudged good; for it ſhall refer to the firſt day and place of requeſt.

CASE 1.

The Queen *againſt* the Archbiſhop of York and S. Buck.

Trinity Term, 33. *Eliz.* *In the Common Pleas.*

Hilary Term, 33. *Eliz.* *Roll* 2350.

The crown ſhall not be diſpoſſeſſed by uſurpation of an advowſon in right of the duchy of Lancaſter. Poſt. 519. S. C. 1. Leon. 126. Owen, 15.

QUARE IMPEDIT, for diſturbing to preſent to the church of *Aekworth*, as in right of the duchy of *Lancaſter*. And declared, that whereas *Henry* the eighth was ſeiſed, &c. and preſented *R.* dean, *Henry* the eighth dieth, and it deſcended to *Edward* the ſixth, and from him to queen *Mary*, and from her to queen *Elizabeth*, and that it became void, &c. The archbiſhop pleaded, that *Heath* his predeceſſor was ſeiſed of the advowſon as in groſs, and collated to it *J. S.* his clerk, who was admitted, inſtituted, and inducted, and died ſeiſed; and ſo pleaded three ſeveral collations one after another, and demanded judgment, if action lay againſt him by the queen. The other defendant incumbent pleaded the ſame plea. Upon this it was demurred; and the queſtion was, If this double or treble uſurpation put the queen out of poſſeſſion of an advowſon which ſhe had in right of the duchy of *Lancaſter*?—And adjudged it did not (*a*): for ſhe ſhall have her privilege in this as if it

(*a*) See 7. Ann. c. 18. Cro. Jac. 124.

had been in right of the crown; and for such advowson a double usurpation did not put her out of possession, as it hath been adjudged. And here is no usurpation, but a collation, which shall not put a common person out of possession. And it was adjudged for the queen, and a writ to the archbishop of *Canterbury*.

THE QUEEN *against* The Archbishop of YORK, &c.

Post. 811. 6. Co. 20. b. 1. Leon. 226. 1. Mod. 255. Ante. 234. 3. Com. Dig. 202.

NOTA. An exception was taken that the writ was general, and did not mention that the queen had it in right of the dutchy; but the count was special, and shewed it: but it was awarded good; and so is the Register, and a precedent shewn in 32. *Hen.* 6. accordingly.

Hall *against* Turbett.

CASE 2.

REPLEVIN. The defendant justifieth by reason of a fine assessed by a steward in a court leet, for not coming to the court and doing his suit; and for it a distress taken: and upon this it was demurred —And all THE JUSTICES held that the assessment being without presentment, that he ought to do suit at court, was without warrant; and in such case he shall be rather amerced than fined. For ANDERSON said, for such offences as are within the conusance of the steward as judge, and of which he hath the view, he may assess a fine; but of others not, except they be presented; and *non constat* to the steward, if he were resident within the leet or not, or what cause he had for his absence. And PERIAM said, if he shall assess the fine, he will assess it too grievous; and so the party shall have no remedy. But for amerciaments, a *moderata misericordia* lieth. 10. *Hen.* 6. *pl.* 7.—And for this cause the plaintiff had judgment.

The steward of a leet cannot fine for not doing suit without a presentment, and then he shall be amerced.

Moor, 89. Kitchen. 43. a Co. 8. 41. a. Andrews, 47. Post. 860. pl. 33. 5. Com. Dig. 174, 175.

Kindler *against* Leversage.

CASE 3.

REPLEVIN. The case was, *A.* seised of the land, made a lease at will, rendering six pounds *per annum*; and by another deed reciting this rent, he granted *eundem redditum* to the defendant for his life: the lease at will determines; the question was, If the grantee shall have this rent for his life, according to the words of the grant?—And resolved he should, for *eundem* shall be taken for *talem*, VIZ. *eundem in specie*: VIZ. six pounds *per annum*: as in the queen's patent of a grant of *easdem libertates* to *Islington*, *quas London. &c.* this is not the same, but *tales libertates*. And it was afterwards adjudged for the avowant, that the rent shall continue during his life.

Ambiguous words shall be taken strongly against a grantor, and beneficially for a grantee.

Plowd. 10. Cowp. 600.

Margaret Palmes *against* The Bishop of Peterborough.

CASE 4.

QUARE IMPEDIT. He pleads, that he demanded of *J. S.* the presentee of the plaintiff, to see his letters of orders, and he would not shew them; and for this cause, for that he was not ascertained whether he were deacon or not: and also he demanded of him letters missive, or testimonials testifying his ability; and because he had not his letters of orders, nor letters missive, nor made proof of them otherwise to the bishop, he desired leave of the bishop to bring them; and he gave them a week, and he went away, and came not again; and that the six months past, and he collated by lapse. And upon demurrer upon it, it was adjudged for the plaintiff; for these were not causes to stay the admittance; and

A presentee need not shew his orders, and a plea *pro eò quòd non monstravit* to *qu. imp.* is bad.

Post. 441. 5. Com. Dig. 71.

PALMES *againſt* Bp. of PETERBOROUGH.

the clerk is not bound to ſhew his letters of orders or miſſive to the biſhop, but the biſhop muſt try him upon examination for one and other; and the plea is not alledged *in facto*, but *pro eò quòd non monſtravit*; ſo all cometh under the "*eò quòd*" and ſo no part of it is traverſable. And for one and the other cauſe it was adjudged for the plaintiff.

Co. 5. 57. a. 1. Saund. 117. 2. Salk. 539.

CASE 5.

Reade *againſt* Johnſon.

Aſſumpſit will not lie for rent arrear upon a leaſe for years. Ante, 240. 10. Co. 77. a. Poſt. 786. 859. 1. Roll. Abr.

ASSUMPSIT for twenty-four pounds. And declares upon an *indebitatus aſſumpſit*. Defendant pleads *non aſſumpſit*. The jury found, that the plaintiff let to the defendant land for ſeven years, rendering eight pounds *per annum*, and the rent was arrear for three years; and that the defendant did owe no other debt, nor made any other promiſe. *Et ſi, &c.*—And it was held by THE JUSTICES, that the action did not lie, but only an action of debt.

Cro. Jac. 598. 668. Cro. Car. 343. Hob. 284. 1. Brownl. 14. 3. Lev. 150. Hard. 366. 1. Leon. 43. Allen, 29. Jones, 329.

CASE 6.

Simpſon *againſt* Titterell.

Michaelmas Term, 32. & 33. *Eliz. Roll* 914.

A *proviſo* in a leaſe with no penalty annexed is *a condition*; but if a penalty be annexed, it is *a covenant*. Ante, 73. Poſt. 385.

EJECTIONE FIRMÆ. One *Bendlows* let the land to the defendant for years: PROVISO SEMPER, and it is further covenanted, that the leſſee ſhall not aſſign his term to any other, except to the leſſor, paying as much as another; and if the leſſor will not have it, that then he may alien it to none except his mother or his ſon. The leſſee aſſigned it to his mother; leſſor entered, and let it to the plaintiff: the queſtion was, If the words were a condition, or only a covenant?—And all THE JUSTICES held it was a good condition to defeat the eſtate. For PERIAM ſaid, *proviſo always* implieth a condition, if there be not words ſubſequent, which may peradventure change it into a covenant; as where there is another penalty annexed to it for non-performance, as *Dockwray's Caſe*, 27. *Hen.* 8. *pl.* 14. But it is a rule in *proviſoes*, where the *proviſo* is, that the leſſee ſhall perform or not perform a thing, and no penalty to it, this is a condition, otherwiſe it is void; but if a penalty is annexed, *aliter eſt*: to which the reſt of THE JUSTICES agreed.—And it was adjudged for the plaintiff, that the entry was lawful.

1. Roll. Ab. 410. Co. Lit. 203. b. 2. Co. 71. b. 1. Bac. Abr. 529.

CASE 7.

Barret *againſt* Hevelett.

Eaſter Term, 33. *Eliz. Roll* 810.

Treſpaſs of aſſault, battery, and wounding. Plea, not guilty as to the *vi et armis*; and a juſtification *molliter manus impoſuit* as to the reſidue, adjudged bad upon demurrer.

TRESPASS for aſſault, battery and wounding, *apud Downham* in the county of *Suffolk*, 26. *September*, 21. *Eliz.* The defendant pleaded, *quoad vi et armis* not guilty, and *quo ad reſiduum tranſgreſſionis actio non, &c.* For he ſaid, that PHILIP *Earl of Arundel* was ſeiſed of ſixty acres of paſture, called *Shepherd's-hole*, in *Thetford*, in the ſaid county of *Suffolk*, and let them to *Ro. Whitney*, 28 *Eliz.* for twenty-one years; and that the plaintiff *tempore quo clauſum prædict' fregit et cunicalos ipſius Rob. ibidem inventos cum retibus et aliis ingeniis capere voluit*; for which the defendant, as ſervant to the ſaid

Ante, 94. Lut. 929. 3. Lev. 404. 2. Vent. 193. Skinn. 387.

R. and

R. and by his commandment, *tempore quo et molliter manus impoſuit* upon the plaintiff at *T.* in the ſaid ſixty acres, to hinder him from taking and carrying away the ſaid conies, *quæ eſt eadem inſultus et tranſgreſſio unde, &c.* ABSQUE HOC that he is guilty *de tranſgreſſione et inſultu, &c. alibi vel alio modo in dict' com' Suff. prout, &c. et hoc.* Upon this it was demurred in law; and adjudged for the plaintiff. BARRET *againſt* HEVESETT.

NOTA. This caſe was taken out of the record delivered to the reporter by BROWNLOW *prothonotary.*

Hartopp's Caſe.

CASE 1.

Trinity Term, 33. Eliz. In the Court of Wards.

ELIZABETH HARTOPP deviſed lands to *Denham*, and three others in fee, to the uſe of *Thomas Hartopp* her brother, and the heirs males of his body; and for default of ſuch iſſue, to the heirs females of his body, with other remainders over. *Thomas* dieth, having iſſue a daughter, his wife *enſeint* with a ſon, which is afterwards born. And afterwards *Elizabeth Hartopp* dieth.

The heirs of a deviſee in tail who dies in the life-time of the deviſor cannot take under the will, for the eſtate never veſted in the anceſtor. Poſt. 423.

The queſtion was, If the ſon, or daughter, or neither of them ſhould have the land?

And upon argument, it was ruled by WRAY and ANDERSON, *Chief Juſtices*, KINGSMILL and MORRIS, *Surveyor and Attorney of the Court of Wards*, that neither of them ſhould have the land. For it being deviſed to the uſe of *Thomas*, *ut ſupra*, and he dying before the deviſor, this cannot veſt in the heir, for it never veſted in the anceſtor; for the word "*heirs*" is not to give the immediate eſtate, but by way of limitation; and if this ſhall veſt in the heir, it ſhall veſt in him as a purchaſor, which was not the intent of the deviſor, and ſo ſhall be void. And they conceived the caſe doth not differ from *Bret and Rigdin's Caſe* (*a*). But becauſe the office was not fully found, they would not reſolve it; but a *melius inquirendum* was awarded.

Raym. 408. Leon. 253. 1. Co. 101. 2. Lev. 243. 2. Jones, 135. Pollex. 546. Swinb. 35. 1. Stra. 25. 32.

(*a*) Plowd. 345.

Michaelmas Term,

33. and 34. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

CASE 1.

Kenſon *againſt* Reading.

Hilary Term, 30. Eliz. Roll 542.

An exception in a deed of what has before been expreſsly granted is void. Ante, 6.

2. Roll. Ab. 454. Hob. 72. 170. Cro. Car. 130.

TRESPASS. The caſe upon a ſpecial verdict was, The queen had the rectory of *Greenwich*, to which the manor of *D.* did appertain; and granted them *per nomen rectoriæ*, and all the lands, tenements, underwoods, and hereditaments to the ſame belonging, *ſalvis ſemper et omnino reſervatis omnibus groſſis arboribus boſcis et maheremiis de et ſuper præmiſſis:* and, If by theſe words *boſcis*, the underwoods which are before let expreſsly were excepted or not? was the queſtion.—WINTER, *for the plaintiff*, argued that the underwoods are excepted.—FOSTER *contra*. For the underwoods being granted by expreſs words cannot be excepted no more in the caſe of the queen than of a common perſon; for the exception of that which is expreſsly granted is void; otherwiſe it is of a thing that paſſeth only by implication: and here the word "*groſſis*" extendeth to *boſcis arboribus*, &c. and ſo nothing is excepted but *groſſis arboribus*, &c. and not the underwoods. —And ſo was the opinion of THE COURT, that an exception in the queen's grant cannot be of that which is before expreſsly granted, and her intent here is apparent by the word "*groſſis*" to except only the great wood; and it ſhall be referred as well to the trees as to the reſt. And it was adjudged for the defendant.

CASE 2.

Hill *againſt* Pilkington.

Hilary Term, 32. Eliz. Roll 171.

Debt on bond conditioned for the performance of covenants, will lie on a breach of the covenants before the condition is performed, though the indenture becomes void before the action is brought.

1. Wood's Con. 411. 457. Dougl. 49.

DEBT upon an obligation. The condition was to perform covenants in a leaſe. The defendant pleads covenants performed. The plaintiff by replication ſhewed the covenants in the indenture; whereof one was, that he ſhould enjoy ſuch lands, let to him, quietly, without interruption; and ſheweth *in facto*, that the defendant 20. *March*, 30. *Eliz.* had diſturbed him, and in that aſſigneth the breach. The defendant by rejoinder ſheweth, that in the indenture there was a *proviſo*, that if he payeth 10l. the 31ſt of *March*, 30. *Eliz.* that then the indenture and all therein contained ſhall be void: and alledgeth that he paid the 10l. at the day; but this was after the diſturbance ſuppoſed. Hereupon it was demurred.—And after opening of the caſe by BEVERCOTTS, *for the plaintiff*, it was adjudged without any great argument for the plaintiff. For by the covenant broken before the condition performed, the obligation was for-

feited; and it is not material that the covenants become void before the action brought.—But WRAY said, that if the *proviso* had been, that upon the payment of the 10l. as well the obligation as the indenture should be void, it had been peradventure otherwise; for then the bond was void before the action brought. The 35. *Hen.* 8. *Dyer*, 57. and *Bylowe's Case* was cited, where a parson made a lease for years, in which were divers covenants, and after he became non resident, by which the indenture became void; yet he might maintain an action of covenant, for a covenant broken before his non residency. *Vide Dr. Hector's Case, antea, Mich.* 29. & 30. *B. R. placito* 37. *page* 77, 78.

HILL *against* PILKINGTON

See 8. & 9. Will 3. c. 11.

Porter *against* Gray.

CASE 3.

Trinity Term, 33. *Eliz. Roll* 365.

A VOWRY for an amerciament in a leet. For that *Edward* the sixth granted the hundred of *H.* in which was a leet, to *G. Owen* in fee, who died seised, and it descended to *J. Owen* his cousin and heir; who being seised, granted it to *Foster* in fee; who by deed inrolled granted it to *the Earl of Leicester* in fee, who by deed inrolled granted it to *Lord Norris* in fee; and for that the defendant was resident within the hundred, and appeared not at a leet held 23d *April* 32. *Eliz.* he was amerced twelve-pence; and for that the distress, &c. Upon this avowry it was demurred in law.—First, Because he pleaded that *G. Owen* died, and it descended to *J. Owen*, his cousin and heir, and shewed not that *G.* died without issue. *Sed non allocatur*; for it shall be clearly intended.—Secondly, That he said that *J. Owen* did grant it to *Foster*, but shewed no deed of the grant. And it was ruled to be ill, for this cause; for it cannot be granted but by deed, which must be shewn.—Thirdly, That the defendant did not shew that the court was held within a month after *Easter*. And this was held a good exception, it being a leet by grant; but of a leet by prescription it is otherwise. 20. *Hen.* 7. *pl.* 22. 18. *Hen.* 6. *pl.* 11. And they were of opinion to give judgment for the plaintiff; but would advise, &c.

A leet cannot be granted but by deed, and it must then be holden on the day mentioned in the grant. Ante, 125.

2. Inst. 72. 2. Hawk. 90.

Love *against* Wotton.

CASE 4.

Hilary Term, 33. *Eliz. Roll* 188.

DEBT upon an obligation. The defendant pleaded the statute of usury made 6th *Feb.* 13. *Eliz.* (whereas the parliament did begin the second of *Feb.* 13. *Eliz.*) and that the obligation was taken by usury. The plaintiff replied, it was not made for usury, &c. *contra formam statuti modo et formâ prædict.* Upon this they were at issue, and found for the plaintiff.—And for that the statute was mis-recited, and it was a general law of which the Court is to take conusance;—although both the parties do agree there is such a statute, yet the Court well knowing there is no such statute, and so cannot be *contra formam statuti*, held no judgment could be given for the plaintiff, it being in the bar of the defendant;—THE COURT held it clearly ill; and that a repleader ought to be, although it was after verdict. And it was adjudged that there should be a repleader. 1. *Mary*, *Dyer*, 119.

A repleader granted after verdict, in debt on a bond, for the mis-recital of the time when the statute pleaded was made; notwithstanding the parties had admitted the existence of the statute, by their pleading. Ante, 236.

1. Burrow, 302. 4. Burr. 2246. Comyns, 148. 3. Bac. Abr. 111. 112. 372. 4. Bac. Abr. 658. Doug. 396. 747.

Case 5.

Tayler *againſt* Fiſher.

Eaſter Term, 32. *Eliz. Roll* 146.

A wife cannot give a perſon authority to enter her huſband's houſe. Poſt. 876.

2. Ro. Rep. 55. 3. Leon. 267. Chan. Ca. 38. 6. Mod. 162. 5. Bac. Abr. 182. 2. Term Rep. 366.

TRESPASS for breaking his houſe, and taking away a corſſett and a pike of the plaintiff's. The defendant pleaded, that long time before the treſpaſs ſuppoſed, *J. Bamfield* was ſeiſed of the ſaid corſſet and pike as of his own goods remaining in the plaintiff's houſe, and that he ſold them to the defendant; and thereupon he *tempore quo, &c.* came to the plaintiff's houſe and demanded them; and the wife of the plaintiff then and there (the plaintiff being abſent) licenſed him to enter into the houſe, and take them; and he thereupon entered, &c. and took them, as it was lawful for him to do, &c. And upon this it was demurred.—And after divers motions, it was adjudged for the plaintiff, that he ſhould recover as to the entering into the houſe, but not as to the goods; for the goods being in the plaintiff's houſe, and it not appearing how they came there, *viz.* either as treſpaſs or otherwiſe, he cannot of his own head enter; and the wife's licence to enter into her huſband's houſe is not good, for ſhe cannot give one authority to enter into her huſband's houſe.—But GAWDY *contra*: for it may be intended the goods were there by the plaintiff's licence, and then he might well enter and take them: but the THREE OTHER JUDGES *contra*. And it was adjudged for the plaintiff. *V.* 30. *Ed.* 3. 12.

Case 6.

Bretton & Elizabeth his Wife *againſt* Bolton of Gray's Inn.

An action on the caſe upon *aſſumpſit*, will lie for the non-performance of a promiſe to provide the plaintiff with *better ſecurity*, in conſideration of her delivering up to a third perſon a bond in which the defendant and ſuch third perſon were co-obligers, and lending ſuch third perſon an additional ſum of money.

1. Roll. Ab. 97. 2. Burr. 1095.

ASSUMPSIT. The plaintiffs declared, That whereas *Thomas Bolton* was the brother of the defendant, and the defendant was a counſellor, *et peritus in lege*; and whereas the defendant did know that the ſaid *Thomas* was ſeiſed to him and the heirs males of his body, the remainder to the defendant, and to the heirs males of his body, of the manor of *Heywood* in the county of *Norfolk*; and that the ſaid *Elizabeth* the wife of the plaintiff had lent 100l. to the ſaid *Thomas*, for the payment of which ſum, at a certain day to come, the ſaid *Thomas* and the defendant were obliged by their writing obligatory *ſigillo ſuo ſigillat'* jointly and ſeverally in 200l. the defendant, in conſideration that the ſaid *Elizabeth* at his ſpecial inſtance ſhould deliver to the ſaid *Thomas* the ſaid writing obligatory to be cancelled, and ſhould lend to the ſaid *Thomas* another 100l. did aſſume to the ſaid *Elizabeth*, that if ſhe would refer to the defendant the making of the ſaid aſſurance for the 200l. and would uſe no other counſel than the counſel of the defendant, that he would provide *talem aſſurantiam proinde pro prædict' Elizabethâ per qualem ipſa eadem Elizabethâ haberet majus advantagium* of the ſaid *Thomas*, if he ſhould make default of payment of the ſaid 200l. than ſhe had before for the ſaid 100l. And alledged *in facto*, that ſhe, truſting to his promiſe, uſed no other counſel, &c. and delivered to the ſaid *Thomas* the ſaid bond to be cancelled; and that ſhe lent to the ſaid *Thomas* the other 100l. And that the defendant not regarding his promiſe, but intending to defraud her, then and there knowing that the ſaid *Thomas* was *adtunc, ut præfatur*, ſeiſed in tail, *viz.* to him and his heirs males of his body (but ſaith not where the reverſion or remainder was) then and there *falsò et malitiosè* provided for her aſſurance a grant of an annual rent iſſuing out

out of the ſaid manor of *Heywood* to have in fee (and ſhewed it in certain) which was a rent-ſeck; which ſhe, truſting to the ſaid promiſe, received for the ſecurity of her 200 l. And alledged *in facto*, that the ſaid *Thomas* within one year died without iſſue, by which after his death the ſaid rent ceaſed and became void; and the ſaid manor came to the defendant diſcharged of the ſaid rent. And further alledged, that the defendant provided no other aſſurance for the payment of the ſaid 200 l. and that the ſaid 200 l. and every part thereof were yet unpaid; *et ſic* the defendant falſely and malicioufly deceived the ſaid plaintiff in providing the ſaid aſſurance for the payment of the ſaid 200 l. by which ſhe is without remedy for the payment of the ſaid rent, or the ſaid 200 l. *ad damnum* 400 l.—The defendant pleaded *non aſſumpſit*, and found againſt him. BRETTON & his WIFE *againſt* BOLTON.

DIVERS MATTERS were alledged in arreſt of judgment.

FIRST, It was alledged, that whereas the ſaid *Thomas* and the defendant were obliged *per ſcriptum ſuum obligatorium ſigillo ſuo ſigillat'*; and ſo is uncertain, for it cannot be the bond of both, for it is *ſigillo ſuo, &c.* in the ſingular number.—*Sed non allocatur*; for *ſigillo ſuo* may be referred to both their ſeals, and both may uſe one ſeal. Divers exceptions to a declaration on the caſe in *aſſumpſit*.

SECONDLY, The *aſſumpſit* is, that if ſhe at his inſtance and requeſt would deliver the bond, &c. and ſhe alledgeth that ſhe delivered the bond, &c. but ſaith not that ſhe delivered it at his inſtance; and if it was not delivered at his inſtance, but upon ſome other conſideration, as it may be intended, it is no performance of the conſideration.—*Sed non allocatur*; for when ſhe delivered the bond to be cancelled, it ſhall be intended upon the conſideration before, and at the requeſt of the defendant. 2. Vent. 71. Cro. Jac. 494.

THIRDLY, For that it was alledged, that the defendant well knowing that the ſaid *Thomas* was ſeiſed *ut præfertur* in tail, but ſaith not in whom the remainder was; and it might be to his right heirs; and then the rent-charge may have continuance.—*Sed non allocatur*; for when in the recital it is ſaid that *Thomas* was ſeiſed in tail, the remainder to the defendant; and it is ſaid afterwards that *Thomas* was ſeiſed *ut præfertur* in tail; this ſhall be intended with remainder over as before.

FOURTHLY, Upon the ſubſtance of the matter, that this aſſurance that was made was better than what ſhe had before; for it is not alledged when the firſt 100 l. was to be paid, but at a day to come, which may be long after; and here the rent that was granted being an inheritance which charged the land, was a better aſſurance than a bond which charged the goods, for which ſhe had no remedy if the obligor left no aſſets to his executor.—But THE COURT held clearly the contrary; for the bond charged his perſon and his executors after his death, but this rent did only charge his land during his life; and he being dead, ſhe had no remedy.

FIFTHLY, The concluſion of the action ſounds in nature of a deceit, and then the iſſue *non aſſumpſit* is no anſwer to that with which the plaintiffs have charged the defendant.—*Sed non allocatur*; for the plaintiffs having declared upon the whole matter, and having ſhewed to the Court ſufficient matter that the defendant had not performed his promiſe, the concluſion is not material; but THE COURT ſhall adjudge upon the whole matter precedent; ſo it is a good iſſue. And the plaintiffs had judgment.

CASE 7.

Sir Richard Buckly *againſt* Wood.

See the Commencement of this Caſe, Ante, page 230. *Caſe* 21.

To charge another with felony or piracy by bill in equity is actionable; for the Court not having juriſdiction over theſe offences, it is not a proceeding in the courſe of juſtice. Ante, 230.

IT was now moved again by EGERTON, *for the plaintiff*, that the bill was not lawfully exhibited in the ſtar-chamber, for matters concerning his life which were not examinable there, for then his own oath ſhall prejudice him; and if the action did not lie for the exhibiting, yet it lay when he ſpoke of it in the country; and ſpoke of the ſubſtance thereof (as it is expreſsly alledged in the declaration), and ſaid that his bill, and all that was contained in it, was true; for this an action lieth, for this is not in a courſe of juſtice.—TANFIELD. If the bill contain any matter of ſlander of another than of him againſt whom it is exhibited, an action lieth; as in 2. *Eliz. Stanley v. Courſey*, where the witneſs goeth beyond the point in iſſue, or queſtion, and ſlandereth a third perſon, action lieth: but here the exhibiting of the bill is only in courſe of juſtice, and concerneth himſelf only, and ſo is not puniſhable; and then his ſaying in the country that his bill was true, &c. is not puniſhable. And he ſaid that the declaration is uncertain; for it is that the defendant did exhibit his bill, containing *inter alia* this matter which is not good; for it might be there were words of qualification in the bill which qualified the firſt words, and therefore the whole bill was to be recited.—But all THE JUSTICES held this exception not to be material; for if there were any words of qualification, they were to be alledged by the defendant; and it ſhall not be otherwiſe intended, but rather that it contained this matter of ſlander amongſt other matters of ſlander. And for the matter, they all reſolved that the action lay; for they were not matters examinable in ſtar-chamber; and when he exhibited the bill maliciouſly in ſlander of the plaintiff for matters not examinable there, it is reaſon he ſhould be puniſhed; and eſpecially when he ſpoke of the matters in the country, and publiſhed them and affirmed they were true.—But WRAY ſaid, if the bill had been well exhibited, for which matters the Court might take examination, ſo that his complaint was in courſe of juſtice, an action did not lie, although they were falſe and ſcandalous; and if it did not lie for exhibiting the bill, then it lay not for ſaying that it was true.—But in the principal caſe they reſolved *ut ſupra*. And the precedent *Bowes' Caſe* was ſeen in court, which was all one with this Caſe, except that the words "*inter alia*" were left out; and all the bill was recited. And afterwards at the end of the term it was adjudged for the plaintiff. 4. *Co.* 14. *B.*

4. Bac. Abr. 490. 518. 1. Saund. 131, 132. 1. Term Rep. B. R. 111.

Poſt. 364. 725.

4. Co. 15. a.

CASE 8.

Dalton *againſt* Sheffington.

Trinity Term, 32. *Eliz. Roll* 110.

Variance. Ante, 85.

ERROR to reverſe an outlawry. The original was *Sheffington*, and the meſne proceſs *Skeffington*: and for this variance it was reverſed.

CASE 9.

Atkins *againſt* Atkins.

Hilary Term, 33. *Eliz. Roll* 776.

Deviſe to *S.* and the heirs of his *body*, and after his deceaſe to *B.* the eldeſt ſon of *S.* and the heirs of his *body*; and after his deceaſe to *E.* the eldeſt ſon of *S.* and to the heirs of his *body* with remainders over, is an eſtate tail in *S.* 2. Eq. Caſ. Ab. 315. Ld. Ray. 204. 1437. 1440. 1562. Lucas, 181. 2. Peere Will. 476. 1. Strange, 729. Dougl. 267. 757.

ERROR to reverſe a judgment in *Norwich*, in a writ of dower. The caſe was, *J. S.* deviſed land to *S.* and to the heirs of his body; and after his deceaſe to *B.* the eldeſt ſon of *S.* and to the

heirs of his body, the remainder over to three other of the ſons of *S.* in the ſame manner. The queſtion was, What eſtate *S.* had in the land?—HUBBARD argued that he had eſtate for life, the remainder to his ſons as purchaſors.—COKE *contra*, That he had an eſtate tail; for by the firſt words an expreſs eſtate in tail was given to him; and there are no ſpecial words to correct or alter them.—It was afterwards adjudged that *S.* had an eſtate in tail; and that his wife ſhould have dower: and the firſt judgment in the writ of dower was affirmed.

ATKINS *againſt* ATKINS.

Nelſon and Bugg *againſt* Woodward.

CASE 10.

See the Commencement of this Caſe, Ante, page 188. *Caſe* 13.

PROHIBITION. The caſe ws moved again.—GAWDY, *Juſtice*, held, that conſultation ſhould not be granted; for it is as a contract for tithes to come, which may be without deed, and may be for life or years, and it is a contract that goeth in diſcharge of payment of tithes; but a leaſe or grant of tithes muſt be by deed, 21. *Hen.* 6. *pl.* 43. and here a prohibition lieth to avoid circuity of action.—And of this opinion was CLENCH, *Juſtice*.—WRAY, *Chief Juſtice*, and FENNER *contra*, That this is a ſale, and cannot be without deed, and a grant and contract for tithes is all one; but a ſale for one year may be of tithes without deed (*a*), and it is not reaſon he ſhould make a deed to every one of his pariſhioners for each of their tithes for a year: and WRAY, *Chief Juſtice*, ſaid, he had conferred with the Juſtices of his houſe, and they were of his opinion. And as to the circuity of action, the plaintiffs here can have no action upon the promiſe; for this was made with *P.* And although they are aſſignees of the land, yet they can have no action.—*Et poſtea, in Eaſter Term*, 35. *Eliz.* it was adjudged for the defendant, that this agreement cannot be without deed, and the aſſignee hath no colour to take thereof advantage: and a conſultation was granted.

A compoſition *by parol*, that in conſideration of 5 l. paid to the parſon, lands ſhould be diſcharged of tithes during the parſon's life, is not good. Ante, 188.

2. Ro. Ab. 63. Sed vide Yelv. 94. Cro. Jac. 137. and 3. Com. Dig. 91. *contra*. 3. Bac. Ab. 337. 5. Bac. Ab. 93.

(*a*) See 5. Geo. 3. c. 17.

Leeks' Caſe.

CASE 11.

HE was indicted by the name of JOHN LEEKS, *alias* STYLE *de Dets*.—And it was held to be ill, for he ought to have his addition before the *alias dictus*: and ſo it was ruled in *Grymes' Caſe*, although both the names be not recited in the *alias*.

The addition of the defendant's name muſt be before the *alias dictus*. Ant. 158. 2. Hale, 178.*

Lacy *againſt* Lacy.

CASE 12.

ASSUMPSIT. That whereas the defendant was poſſeſſed of a leaſe for years, the reverſion to the queen, in conſideration of ten pounds paid by the plaintiff to him in hand, and of ten pounds to be paid to him upon the procuring of a new leaſe to the plaintiff, the defendant did promiſe to ſurrender his leaſe, and to procure a new leaſe to the plaintiff before the end of *Trinity* term; and that he had not performed it. Upon *non aſſumpſit* pleaded, it was found for the plaintiff. And it was ſaid in arreſt of judgment, that the declaration was not good, becauſe he did not alledge he was ready to pay the other ten pounds at the end of *Trinity* term.—*Sed non allocatur*; for it was not to be paid till the defendant procured the leaſe, ſo he was to do the firſt act. And the plaintiff had judgment.

Performance of a promiſe made in conſideration of the previous performance of another promiſe, need not be averred.

CASE 13.

Brable *againſt* Hollywell.

Trinity Term, 33. *Eliz. Roll* 483.

A declaration on a promiſe to deliver ſo much corn if the plaintiff liked thereof, muſt ſhew that the plaintiff gave notice of his approbation. Sed vide poſt. 234.

ASSUMPSIT. The plaintiff counts, that the defendant upon a certain conſideration promiſed to deliver to him forty quarters of wheat between *Sturbridge* fair and *Chriſtmas*, if the plaintiff liked thereof at *Sturbridge* fair; and ſhewed he liked thereof; and upon the laſt of *November*, at ſuch a place required, the defendant to deliver them, which he had not done. Upon *non aſſumpſit* pleaded, it was found for the plaintiff. And it was alledged in arreſt of judgment, that the declaration is not good, becauſe it is not ſhewn in the court that he ſhewed his liking to the defendant; and his liking is ſecret, of which the defendant cannot take notice; and therefore of neceſſity it muſt be alledged 17. *Edw.* 4. and ſo it was ruled this term in *Chapman v. Hurſt*, which is entered *Trinity Term*, 33. *Roll* 487.—But it was anſwered, that his liking was ſufficiently ſhewn, when it is alledged he required them at ſuch a day.—But THE COURT held, this will not aid him, as this caſe is; for the liking is to be at *Sturbridge* fair, and here a requeſt is alledged *ult. Nov.* which is long after, and at another place. And judgment was given for the defendant.

CASE 14.

An executory conſideration may be traverſed in *aſſumpſit*. Dougl. 471.

Anonymous.

ASSUMPSIT. The plaintiff declared, That the defendant, in conſideration the plaintiff ſhould ſerve him for one year, and manure his land, &c. promiſed to pay him forty ſhillings; and alledged *in facto* that he ſerved him for one year, and manured his land, &c. The defendant pleads, the plaintiff did not ſerve him for one year, but departed from his ſervice within the year. Upon iſſue joined, it was found for the plaintiff. And it was alledged in arreſt of judgment, that the iſſue was not well joined, for it was a traverſe of the conſideration, which is not traverſable.—But it was ruled good, and the plaintiff had judgment.—NOTA. The reaſon ſeemed to be, becauſe it was a conſideration executory.

Ante, 201.

CASE 15.

Words, the meaning of which are peculiar to the place where they are ſpoken, may be rendered actionable by the interpretation of an *innuendo*. Moor, 419. Yelv. 153.

Coles *againſt* Haveland.

ACTION for theſe words: "*Coles* hath ſtrained a mare, *innuendo* "*carnaliter cognovit æquam*." The jury found that the defendant ſpake the words, "*C.* hath ſtrained a mare," *meaning that carnaliter cognovit*." And upon theſe words the plaintiff had judgment, although it was alledged that the words in themſelves had no ſenſe, and the *innuendo* will not help the matter, but only denote the perſon.—But becauſe the verdict hath found preciſely that this was his meaning, and it is a phraſe of the country, it was adjudged for the plaintiff.

Carter, 214. Hob. 126.

CASE 16.

Words in the *potential* mood may qualify an *indicative* context, and render them not actionable. Ante, 6. Cro. Jac. 331. 2. T. Rep. 473.

Stoner *againſt* Audely.

ACTION for theſe words, *viz.* "Aid me to *Stoner*, for I have "felony to lay to his charge, for he would have robbed me." After verdict for the plaintiff, it was alledged in arreſt of judgment, that the words are not actionable; for perhaps the ſaying, "I have felony to lay to his charge," of themſelves are actionable; but when he ſaith further, "for he would have robbed me," they prove no felony, but extenuate the firſt words, and ſhew what he did intend, and the laſt words are not actionable: for to ſay, "One would have robbed me," an action lieth not, without ſhewing ſome overt act put in ure, which is felony, or cauſe

cauſe to bind one to his good behaviour, for though he had an intent, peradventure he repented of it, and did no evil act.—And LEA cited a caſe adjudged in 27. & 28. *Eliz. Tettul & Oſborne*, that theſe words, *ſcilicet*, "Thou wouldſt have murdered me," are not actionable.—And for this cauſe THE COURT inclined that an action did not lie. *Sed adjournatur.*

STONER *againſt* AUDELY.

Stapleton *againſt* Frier.

CASE 17.

Trinity Term, 33. *Eliz. Roll* 189.

Words actionable. Ante, 52. 487. 746.

ACTION for words: "My Lord Preſident of the *North* ſhewed "*Mr. Stapleton* his hand ſet to a book, whereby he had con- "ſented to the late rebels of the *North*; but by the means of *Mr.* "*Fairfax*, my Lord Preſident was perſuaded, and the matter ſup- preſſed."—After verdict for the plaintiff it was moved in arreſt of judgment, that an action lay not; for it is not ſaid he conſented to the rebels; but that his hand was ſet to a book, whereby he did conſent, &c. but ſheweth not who ſet to his hand, and it might be done by another: alſo it is not ſaid he conſented to them in the rebellion, but the conſent may be in ſome other matter, nor that he knew they were rebels: alſo it appeareth not in what they were rebels, if in treaſon, or only upon proceſs of rebellion.—CURIA *contra in omnibus.* For it cannot be his hand, if he himſelf ſets it not to the book, but another may write his name; and when he ſaid he conſented to the rebels, and ſhewed not any certain perſon, this cannot be otherwiſe intended but that he conſented to all the rebels in their rebellion: but if he had ſaid that he conſented to *A.* and *B.* which were rebels, this peradventure may be intended that he conſented to them in ſome other matter; as it was ruled 26. *Eliz.* in *Brown v. Liſle*, where the words were, "He was confederate with *Campion* the jeſuit," no action lay, for it is not ſaid he knew him to be a jeſuit, nor in what manner he was confederate with him. And in this term it was adjudged for the plaintiff.

Dullingham *againſt* Kyfeley.

CASE 18.

If a vicar ſues a pariſhioner for tithes in the ſpiritual court, and the parſon appropriate appears there *pro intereſſe ſuo*, and the Court will not receive his plea of a *modus*, a prohibition ſhall be granted. Ante, 71.

2. Ro. Ab. 312. Keilw. 110. Moor, 915. Dougl. 378. Cowp. 414.

PROHIBITION. And ſurmiſed, that *Kyfeley* the defendant being proprietor of the parſonage of *Sapſlow* in *Suffolk*, had ſued *Curtis* in the court chriſtian for tythes of certain land in the pariſh of *S.* The plaintiff, being parſon of *Hemington* in the ſame county, came in *pro intereſſe ſuo*; and alledged there is a cuſtom within the pariſh of *Sapſlow*, that the parſon of *Hemington* ſhall have thirteen cheeſes for the tithes of theſe lands in *Sapſlow*; and that in recompence thereof the parſon of *Sapſlow* had thirteen cheeſes for the tithes of ſuch lands in *Hemington*; and upon this matter he grounded his prohibition, alledging, that he had pleaded this in the ſpiritual court, and it would not be received.—TANFIELD moved, that the prohibition lieth not; for it is for one that is not ſued, and it is not reaſon he ſhould ſtay the ſuit of a ſtranger. Alſo here the very right of tithes is to come in queſtion, and not the bounds of the pariſh, and ſo is not triable here, as 35. *Hen.* 6. *pl.* 39. & 47. & 14. *Hen.* 4. *pl.* 17. are.—COKE *contra.* For the right of tithes is not here in queſtion; but a *modus decimandi*, and ſo is triable here; and this was a good matter for the pariſhioner to plead, and that which the pariſhioner may plead; he that cometh in *pro intereſſe* may plead.—GAWDY. The pariſhioner might well plead it; but when the parſon of another pariſh will plead it, by this the right of tithes will come in queſtion between the two parſons. 20. *Hen.* 6.

DELLINGHAM *againſt* KYFELEY.

pl. 18. the caſe is, That when the right of tithes is in queſtion between two parſons, this Court hath no juriſdiction: for the trial of the right, &c. belongs to the civil law. 31. *Hen.* 6.—And afterwards THE COURT was of opinion to grant a conſultation. *Sed adjournatur.*

CASE 19.

The aſſent to the 39 Articles muſt be *unfeigned.*

4. Inſt. 324. 1. Lev. 101.

Smith *againſt* Clerke.

PROHIBITION. The caſe upon ſpecial verdict was, Two incumbents were of the church of *Ungery Hatly* in the county of *Cambridge.* One ſued the other in the ſpiritual court to deprive him for not reading the Articles, and giving his aſſent to them according to the 13. *Eliz.* c. 12. The iſſue being, If he gave his aſſent? the jury found, that he read the Articles, and ſaid, "I give "my conſent unto them ſo far forth as they agree with the word "of God."—And it was adjudged, that it was not ſuch unfeigned conſent as the ſtatute intendeth; but it ought to be abſolute without condition. And a conſultation was awarded.

CASE 20.

A copyhold is not deſtroyed by a ſeverance of the inheritance of the copyhold from the manor.

Ante, 103. Poſt. 499. S. C. 4. Co. 24. b. 8. Co. 64. See Gilb. Ten. 209. 4. Co. 21. Cro. Jac. 573.

Murrel *againſt* Smith.

EJECTIONE FIRMÆ. *Vide* 4. *Co.* 24. b.—THE COURT held, that he remained a copyholder, as before, and the heir might enter without admittance, yet ſhould pay his uſual fine, and do all his ſervices, except ſuit at court; for that is gone by ſeverance from the manor, and ſhould be ſubject to forfeitures, as waſte, &c. —And FENNER, *Juſtice*, ſaid, that he might ſurrender his eſtate to the grantee of the freehold, to the uſe of the grantee, for he had the reverſion, but could not ſurrender to the grantee to the uſe of another, nor the grantee cannot grant it by copy to another; ſo the copyholder muſt always keep it in his hand. But *quære* of this. And the OTHER JUSTICES gave no opinion of this point. 2. Com. Dig. 486. 1. Bac. Abr. 481. 2. Term Rep. 415.

CASE 21.

A deviſe that "*if his wife "educate his "children,*" ſhe ſhall have the land till they come of age, gives her an *intereſt* which does not determine by her death. Poſt. 678. Ante, 190.

Carter, 25. Godol. 349. Lane, 26. 2. Hob. 285. 3

Smith *againſt* Havens.

TRESPASS. Upon demurrer the caſe was, *I. Smith* by his will in writing deviſed, that "If *Elizabeth* his wife think good to "bring up his children in learning, and to find them meat, drink, "and apparel, that then ſhe ſhall have his land till *I. Smith* his "ſon attain his age of twenty-four years;" and dieth. The wife undertaketh the bringing up of the children, and dieth before the ſon came to twenty-four years of age. The queſtion was, If this was only a matter of confidence, or of an intereſt alſo in the land? —And all THE JUSTICES were of opinion, that it was not only a confidence but an intereſt, and it was tied with the condition to bring up the children; and if it ſhould determine, the children ſhould be without remedy for their education. 4. *Eliz. Dyer*, 210. *Et adjournatur.*

Leon. 211. 221. Dyer, 210. Gilb. Dev. 72. Abr. Eq. 195. Gilb. Eq. Rep. 36. Bac. Ab. 410. Powel on Dev. 301, 302.

CASE 22.

If tenant for life and he in remainder in tail join in a leaſe to *A.* for life, remainder to *B.* for life; and the iſſue in tail accepts the rent of *A.* and levies a fine; the leaſe in remainder is good, notwithſtanding the feoffment.

Jeffery *againſt* Coyte.

EJECTIONE FIRMÆ. The caſe upon ſpecial verdict was, *Avice Trevelian* being tenant for life, the remainder to *Thomas* her ſon in tail, they two, 2. & 3. *Ph. & Mary*, let the land by indenture to *Agnes Browne* for life, remainder to *W. Browne* for life, rendering ten pounds rent *per annum.* *Avice* dieth. *Thomas*, that was in remainder, accepts the rent of *Agnes Browne*, and dieth. *Hugh*

Ante, 56. 154.

Trevelian, the iſſue of *Thomas*, accepts the rent of the ſaid *Agnes Browne*, and after enters and makes a feoffment, and levieth a fine to *J. S.* *Agnes Browne* re-enters, and dieth; *W. Browne* as in his remainder enters. The queſtion was, If *I. S.* the purchaſor might avoid this leaſe in remainder; or if the acceptance of the rent from the firſt tenant for life, made this leaſe good to *W. Browne* in the remainder?—GAWDY. This acceptance of the rent by the iſſue in tail, maketh good both the eſtate for life, and the remainder to *W. Browne*, for they make but one eſtate; and if a leaſe be made to two, and the iſſue in tail accepts the rent of one of them, and ſaith he will accept him only for his tenant, yet it is good for both; and theſe eſtates are directed out of both the intereſts of *Avice* and *Thomas* their ſon, for they ſhall join in an action of waſte. 27. *Hen.* 8. *fo.* 17. *Eliz. Dyer*, 339. if tenant for life and he in the remainder join in a leaſe for life, it is a forfeiture; for the leaſe is derived out of both their eſtates, and if it inured by way of confirmation, it could be no forfeiture; and here when *Avice* the tenant for life is dead, the eſtate ſhall be ſaid to be created only by him in the remainder.—And all THE JUSTICES agreed, if it were only the confirmation of *Thomas*, then the acceptance of the rent by his iſſue ſhould not make the eſtate in the remainder good.—WRAY and FENNER held the leaſe is derived out of both their intereſts; and if any can avoid it, it muſt be the iſſue in tail.—CLENCH doubted; for he conceived that the eſtate was only created by the tenant for life, and ſo had granted a reverſion; and ſo the acceptance by the iſſue ſhould not bind him.—But it was afterwards adjudged that the eſtate in remainder was good, and would not be avoided by a purchaſor.

JEFFERY *againſt* COYTE.

Co. Lit. 251. b. Hob. 333. 2. Roll. Rep. 498. Cro Jac. 689. 1. Sid. 62. 4. Mod. 6. 3. Com. Dig. 234. Cowp. 482. Dougl. 53.

Stone *againſt* Radiſh.

Trinity Term, 33. *Eliz. Roll* 762.

CASE 23.

DEBT upon an obligation. The condition was for the delivery of twenty quarters of wheat. The defendant pleaded, that *pendente billâ* the plaintiff had accepted fifteen quarters, and demands judgment of the bill.—And it was adjudged no plea, for it is collateral, and not parcel of the ſum contained in the obligation; and if it be a plea, it is a plea in bar, and not in abatement. And it was adjudged for the plaintiff.

The acceptance of a leſſer ſum *pendente billâ* cannot be pleaded in abatement to debt on bond. *Qu.* If in bar? Ante, 202. Poſt. 260. 342.

Acton *againſt* Hill.

Trinity Term, 33. *Eliz. Roll* 393.

CASE 24.

DEBT upon an obligation. The condition was, That whereas the defendant was made ſub-collector of the ſubſidy by the plaintiff, if he gave a ſufficient account in the exchequer of all ſums which he received, and if he diſchargeth or ſaveth harmleſs the plaintiff of theſe receipts againſt the queen, and procureth to the plaintiff a ſufficient acquittance or diſcharge out of the exchequer, as in the like caſe is uſed, that then, &c. The defendant pleads, that he had accounted, &c. and had diſcharged and ſaved harmleſs the plaintiff, &c. and had procured him an acquittance, &c. Hereupon it was demurred.—WILD moved for the plaintiff, that the plea was not good; for he pleads in the affirmative, that he had diſcharged, &c. and ſhewed not how, &c. 35. *Hen.* 6. *pl.* 21. 40. *Edw.* 3. *pl.* 20.—GAWDY. If the diſcharge is to a particular thing, he muſt ſhew how, &c. but otherwiſe it is when it is to a multiplicity of things, for then a general pleading is good, 5. *Edw.* 4. *pl.* 8. and ſo peradventure it is here.—*Et adjournatur.*

Performance generally, without ſhewing *how*, may be pleaded to an affirmative covenant, if it contain multiplicity. Ante, 232. Poſt. 393. 477. 749. 916.

2. Co. 4. a. Plowd. 7. Moor, 857. 1. Saund. 117. Cowp. 578.

CASE 25.

Clerke *againſt* Hopkins.

Hilary Term, 32. Eliz. Roll 238.

An infant executor, of the age of thirteen, or other perſon by his order, may ſell goods to pay debts.
Ante, 43.
5. Co. 27. b.
Went. 213.
Godol. 103.
1. Roll. Ab. 730.
3. Leon. 143.
Keilw. 51.
1. Chanc. Caſ. 257.
2. Term Rep. 597.

ASSUMPSIT againſt the defendant, as executor to *Simons*. He pleaded, that he is not executor, and that he never adminiſtered, &c. The plaintiff réplieth, that at *D.* in the county of *B.* he adminiſtered goods to the value of, &c. And upon this they were at iſſue. The jury find a ſpecial verdict, that the ſaid *S.* made his wife executrix, and died. The wife proveth the will and adminiſters, and makes *J. S.* her ſon, of the age of thirteen years, executor, and the defendant overſeer, and dieth. The infant proveth the will; the defendant, by the conſent of the infant, ſelleth certain goods, to the value of one hundred and forty pounds, to the uſe of the infant; and, If this were adminiſtration? they pray the diſcretion of the Court.

TREDWAY moved for the plaintiff, that this is an adminiſtration; for although an infant may be an executor, yet he muſt do things as an executor: but it is not found that the goods were ſold in execution of the will; for then it would not be an adminiſtration in the defendant, 1. *Eliz*, *Dyer*, 166. 9. *Eliz. Dyer*, 255. and an infant of the age of thirteen years cannot give his aſſent to the ſale of the goods.

CURIA *contra*. For an infant executor is to pay debts, and then he muſt ſell goods to pay them; for peradventure the creditors will not ſtay, nor take goods for their debts; and therefore the ſale by the infant himſelf is good: ſo is the ſale by another, by his conſent; and when it is no prejudice to the infant, it is without doubt good; and here he doing it as a ſervant to the infant, it is no adminiſtration.—And it was adjudged that the plaintiff ſhould be barred.

CASE 26.

Laund *againſt* Tucker.

On a fine by tenant for life, the reverſioner ſhall have five years after his death to make claim.
Ante, 220.
3. Co. 78. b.
Cruiſe, 215.
2. Bac. Ab. 534.

EJECTIONE FIRMÆ. It was found by a ſpecial verdict, that tenant for life and *J. S.* joined in a fine *ſur coniſ. de droit come ceo, &c.* to a ſtranger, who rendered to *J. S.* for eighty years, remainder to the tenant for life in fee. Proclamations paſs, and the five years paſs without entry by him in the reverſion; tenant for life dieth; the queſtion was, If he in the reverſion ſhould have other five years?—And it was adjudged he ſhould: and ſo it was adjudged in *Some's Caſe*, 7. *Eliz.*

CASE 27.

Hogg *againſt* Croſs.

Hilary Term, 33. Eliz. Roll 685.

A feoffment to *A. habendum* after the death of the feoffor in tail with livery *ſec. for. chartæ* is void.
Ante, 29.
Poſt. 269. 585.
2. Ro. Ab 1066.
3 Lev. 339.
Dyer, 272.
Hob. 171.
Plowd. 147. 160.
2. Co. 24. 55.
8. Co. 154.
Gilb. Ten. 260.

EJECTIONE FIRMÆ of a houſe and garden in *London*, of the leaſe of one *Rice*. It was found by ſpecial verdict, that *J. Warren* was thereof ſeiſed in fee, and held it in burgage, and by his will deviſed it to *Margaret* his wife for life; and dieth. *Margaret* taketh *Rice* to huſband, who made the leaſe. But they further found, that the ſaid *J. Warren*, before the making of his will, made a deed of feoffment to *G. Warren* his ſon, *habendum* after the death of the ſaid *J. Warren*, the feoffor, to the ſaid *G. Warren* in tail; and made livery of ſeiſin *ſecundum formam chartæ*: and, If anything paſſeth by this? they prayed, &c.

G. WRAY, *of Lincoln's-Inn*, argued for the plaintiff, that this feoffment was void, and nothing paſſed, and then the will made afterwards was good; for when no eſtate is expreſſed

Cro. Jac. 376. Co. Lit. 48. b. 2. Bac. Ab. 496. 498. 1. Wood's Con. 237. 245. 248. Cowp. 9.

in the beginning of a deed, but only an implied eſtate for life, as here, and by the *habendum* an expreſs eſtate is limited, this doth controul the implied limitation; and if this be void and repugnant in law, as it is here, being after the death of the feoffor, all is void: but if there be an expreſs limitation in the beginning, if the *habendum* be repugnant, it is void, and the firſt is good; and although livery be made, yet it is tied *ſecundum formam chartæ*, which is void, and ſo all is void; for it is but the execution of a void deed. And this very point was ruled accordingly in *Mayn's Caſe*, in the court of wards.—DALTON *contra*. That an eſtate for life doth paſs by the premiſes, and the *habendum* void.—But all THE JUSTICES reſolved the contrary; for it appeareth to be the intent of the feoffor, that no eſtate ſhall paſs but *in futuro*, *viz.* after his death, which is againſt law; and it being all the purport of the deed, nothing ſhall paſs in any other manner; for nothing ſhall paſs by the premiſes but according to his intent, which is nothing; for he intended not to paſs the freehold immediately. But if one grant a term by deed, *habendum* after his death, this doth paſs by the premiſes; for the premiſes are ſufficient to carry it, and the *habendum* ſhall not utterly deſtroy it: but it is otherwiſe here, where it is to take effect by limitation of the party, which is void, and the livery is alſo void to execute a void deed.—And without further argument it was adjudged for the plaintiff.

Hoe *againſt* Cole.

Emott *againſt* Cole.

CASE 28.

Eaſter Term, 33. *Eliz.* *Roll* 337.

DEBT upon an obligation made *ult' March*, 29. *Eliz.* The condition was, to perform all covenants, conditions, articles, agreements and clauſes in an indenture bearing the ſame date. The defendant pleads the indenture, which was a leaſe for years of certain lands and ſtock of cattle to the defendant and to *Tolfry*, rendering twenty pounds rent *per annum*, and all the covenants and other clauſes in it were concerning the land; and pleads, that long time before the leſſor had any thing in it, one *C.* was ſeiſed of the land in fee, and acknowledged a ſtatute to *J. S.* and that after the leaſe made, *viz.* 29. *May*, 29. *Eliz.* the conuſee ſued execution, and all the land was delivered in execution (ſo they were thereof evicted); and that after the date of the indenture, until execution ſued, he and *Tolfry* had performed all the covenants, conditions, agreements and clauſes in the ſaid indenture. Upon this plea it was demurred in law.—BUCKLEY, *for the plaintiff*, took two exceptions to the plea in bar.—Firſt, The condition was, if the defendant and *Tolfry* and *their aſſigns* perform, &c. And he pleads, that he and *Tolfrey* had performed, &c. but ſaith not that he and *Tolfry* and *their aſſigns* had performed, &c. and it may be they had aſſigned it over.—Second, The condition was, if they perform all the covenants, conditions, agreements, *articles*, &c. and when he recited them, he ſaid not which are all the covenants, conditions, agreements and clauſes in the indenture, but leaveth out "*articles*," ſo hath not pleaded performance of the condition.—The matter in law was, If a leaſe be made of lands and goods rendering rent, if the land be evicted, whether all the rent ſhall be gone, or there ſhall be an apportionment in regard of the goods; and ſo the non-payment of the portion for the rent be a forfeiture of the bond. And he ſaid there ſhall be an apportionment, 12. *Hen.* 8. *pl.* 11. 35. *Hen.* 8. *Dyer*, 56.

A leſſee who is evicted in conſequence of a ſtatute acknowledged by a former owner of the eſtate, cannot be ſued by his leſſor for an apportionment of the rent, on an indenture to perform covenants, &c. and a plea of a performance need only anſwer the indenture *ſubſtantially* and to a *common intent*.

Cowp. 243.

Emott *against* Colt.

if the goods be evicted there shall be an apportionment; and so *è converso*.—Curia *contra in omnibus*. First exception is not material, for it appeareth not there is any assignee, and it shall not be intended except it be specially shewn, and a bar is good to a common intent. Second exception, "*Agreements*" is all one with "*articles*;" and if many words contain one thing in signification, if he answers to them in substance, it is good. For the matter in law, there shall be no apportionment, for the rent issueth out of the land, and follows it: and so Wray, *Chief Justice*, said it hath been heretofore adjudged. And it was here adjudged the plaintiff shall be barred. *Vide* 4. *Eliz. Dyer*, 212. & 361. 9. *Edw.* 4. *pl.* 1. 21. *Edw.* 4. *pl.* 28. & 29.

Post. 607.

Case 29.

Hasset *against* Payne.

No attaint lies if the jury are incomplete. Ante, 222.

ATTAINT.—Coke sheweth to the Court, that in the first *venire* of the *petit* jury, one *George Ellinger* was returned; and upon the *distringas*, *Gregory Ellinger* was returned, and appeared in the lieu of *George Ellinger*, and was sworn and tried the matter; so the trial was by eleven, and then no attaint lieth.—And of this opinion was the whole Court: and for this cause the attaint was stayed.

Case 30.

Bright *against* Metcalfe.

A bill "*to be* "*paid as I pay* "*my other cre-* "*ditors*" must be declared upon *specially*. Cro. Jac. 316.

DEBT upon a bill of five pounds, which had these words, "to be "paid as I pay my other creditors." The plaintiff declared generally, that he was indebted to him in five pounds, *solvendum* upon request. The defendant demanded *oyer* of the bill; and it was entered in *hæc verba*, and pleads an insufficient matter. Upon which it was demurred; and this exception was to the declaration for variance from the bill; for he ought to declare specially according to the bill.—And of this opinion was the whole Court, except Fenner, who was of opinion, that the words "to be paid "as he paid his other creditors" were void, and it is payable immediately upon request; as 4. *Edw.* 4. *solvend'* to a stranger is void. But the others held *è contra*: and it was adjudged for the defendant.

Case 31.

Pendred *against* Chambers.

Hilary Term, 33. *Eliz. Roll* 24.

A replication must conclude with a verification. Cowp. 575. Dougl. 58. 94. 2. Ter. Rep. 439.

ERROR of a judgment given in debt in the court of *piepowders* in *Canterbury*. The error assigned was, That the plaintiff in his replication hath not averred his plea, nor in the end of it demanded his debt and damages.—And for these causes the judgment was reversed (*a*) by Clench and Fenner (Wray and Gawdy *absentibus*).

(*a*) Sed vide 4. & 5. Ann. c. 16. this error must be shewn for cause of demurrer.

A court of *piepowders* may, by prescription, be held out of a market or fair. 1. Lev. 273. 1. Saund. 98. Cro. Jac. 313.

They said a court of *piepowders* may be held, though not in *plena mercatu* or *feriâ*; but this is to be by prescription, and the prescription must be in the stile of the court.

Case 32.

Morris *against* Thomas.

Hilary Term, 33. *Eliz. Roll* 92.

The 31. *Hen.* 8. c. 30. extends judgments given in the grand sessions in Wales. 2. Cr. 672.

ERROR of a judgment in *Anglesey* in *ejectione firmæ*. And the error assigned was, That the *venire facias* was, *quorum quilibet*

habeat

habeat four pounds; whereas the 27. *Eliz.* c. 6. extends not to *Wales*; for it is only of the courts of *Weſtminſter*, and the aſſiſes. To which it was anſwered, that this is no fault at common law; for it is for the benefit of the parties to have the better trial; and if it be, it is helped by the ſtatute of *jeofails*, 32. *Hen.* 8. c. 30. for that extends to all courts of record; and this judgment was at the grand ſeſſions there in *ejectione firmæ*.—And of this opinion was THE COURT, and affirmed the judgment.

MORRIS *againſt* THOMAS.

Calthorp *againſt* Woodward.

CASE 33.

Trinity Term, 32. *Eliz. Roll* 1115.

ERROR of a judgment in debt. The error aſſigned was, that the *venire facias* was awarded upon the roll, *Trin.* 28. *Eliz.* returnable *Mich.* 28. & 29. *Eliz.* and the trial was by *niſi prius*, 4. *July*, before the return of it; which is a calling of the jury without warrant.—THE COURT held, that if the *venire facias* hath an ill *teſte* or an ill return, or is wanting, this is aided by the ſtatute after verdict; but here it is not wanting, but the jury is taken before the return of it, and ſo without warrant: and for this cauſe it is ill, and not helped by the ſtatute.

Venire facias improperly awarded on the roll.

Poſt. 259.

Savery *againſt* Tey.

CASE 34.

Eaſter Term, 33. *Eliz. Roll* 102.

ERROR upon a judgment in debt in *Norwich*, upon the 33. *Hen.* 8. c. 9. for buying of titles.—Firſt error. The defendant pleads not guilty, which is no plea in this action.—But all THE COURT held it good, when the action is grounded upon a penal ſtatute.

Not guilty is a good iſſue to *debt* on a penal ſtatute, but if the verdict be for leſs than the demand, and no judgment for the reſidue, it is bad.—In actions *ad damnum* it is otherwiſe.

Poſt. 621. 766. 699.

SECOND ERROR. The plaintiff demands 50l. for the value of the land, and the jury find the value 20l. upon which the plaintiff had judgment to recover one moiety, and the queen the other moiety; and no judgment was for the reſidue of the 50l. *viz.* that the plaintiff *ſit in miſericordiâ pro falſo clamore ſuo*.—For this cauſe the judgment was reverſed; but in treſpaſs or other actions, wherein the plaintiff declares *ad damnum*, if leſs be found than he declares, the plaintiff ſhall not be amerced; becauſe the action is grounded upon an uncertainty.

Co. 8. 61. a. 1. Roll. 217. Dyer, 75. a. Cro. Car. 453. 3. Mod. 324. 1. Sid. 232. Skin. 280. 5. Com. Dig. 177. 2. Bac. Ab. 511. 1. Term Rep. B. R. 462.

Griffin *againſt* Bover.

CASE 35.

ERROR to reverſe an outlawry upon judgment. The error was, That the *original* was GRIFFIN, and the *capias* GIFFIN.—And for this cauſe it was reverſed.

Outlawry reverſed for variance.

Ante, 50 85. 104.

Haſelip *againſt* Chaplen.

CASE 36.

Eaſter Term, 33. *Eliz. Roll* 292.

ERROR upon a judgment in the common pleas in replevin, where the defendant avowed for an *eſtray*. Error aſſigned was, For that the defendant had return awarded to him with coſts and damages, whereas no coſts or damages are given in this caſe, neither by the 7. *Hen.* 8. c. 4. or 21. *Hen.* 8. c. 19. for they are only in avowries for rent, ſervices, cuſtoms, and damage-feaſant, ſo this is out of the ſtatutes. But it was anſwered, the ſtatutes are to be expounded, that the avowant ſhall have coſts and damages as well

Quære, If an avowant ſhall have coſts and damages for an eſtray.

1. Bl. Rep. 95. 2. Com. Dig. 548. 1. Bac. Ab. 522. 1. Burr. 406. Dougl. 709. 2. Ter. Rep. 235.

HASELIP *against* CHAPLEN.

well in other cases, as in those recited; for they are recited only by way of example.—But THE COURT doubted, for damages are penal, and shall not be taken by equity; and they conceived it error, but would advise (*a*).

(*a*) See this case moved again, post. 329. when the judgment was reversed.

CASE 37.

A clerical misprision on the roll may be amended after verdict by an original paper. Lit. Rep. 278. Hetley, 142. Latch. 165. Roll. Abr. 207. Cro. Jac. 165. 2. Leon. 120. 3. Mod. 316. 12. Mod. 8. 684. Strange, 139. 734. 947. Ld. Ray. 1441. Dougl. 135. 1. Ter. Rep. 783.

Ramsey *against* Bird senior and Bird junior.

ASSUMPSIT. After verdict for the plaintiff, it was alledged in arrest of judgment, that the declaration upon the file supposeth the promise to be made by *Bird senior* only; but the roll, and the record of *nisi prius*, and all the proceedings afterwards were well laid to be by both; and by examination it appeared, that the paper-copy under the hand of the counsellor (which is the first thing that is put into court) was, that the promise was made by both. And the question was, If it might be amended? And it was strongly urged that it ought not; for the file is as the original, and is the warrant of the roll, and of all the proceedings; so that if the roll be ill, it may be amended by the file; but the file is not to be amended. And it was said, it was so adjudged in this court, *Trin.* 31. *Eliz. Rot.* 774. in *Greenway v. Elmes. Co.* 8. 159. a. 161. b.

But all THE COURT (except FENNER) held the contrary, that it might be well amended; for as BRIAN saith, 10. *Hen.* 7. *pl.* 25. papers are now as records; so that when it appeareth that the paper declaration is good that the promise was by both, it is the fault of the clerk to enter it upon the file to be by one: and so it was adjudged to be *amended*, and the plaintiff had judgment to recover.

CASE 38.

Variance amended. Ante, 57. 222. Dougl. 194. 1. Ter. Rep. 238.

Denner *against* Shacroft.

ACTION SUR TROVER. In the *distringas jurat'* the defendant was named *Shacraft*, but in the *venire facias* and all the other proceedings he was truly named: and this *mis-nomer* was alledged in arrest of judgment.—WRAY. The difference here is little, and in some countries *a* is sounded for *o*, and so is not material: and it was awarded to be amended, and the plaintiff had judgment.

CASE 39.

Variances between the *venire facias* and the *distringas* may be amended. Ante, 222.

Cotton's Case.

ACTION for words. In the *venire facias* a juror was returned by the name of *J. S.* of *Abbotsan*, and in the *distringas* he was returned by the name of *J. S.* of *Abbatsan*: and it was awarded to be amended.—So in this term between *Mortimer and Oger*, a juror in the *venire facias* was named *De Hust*; and in the *distringas De Hurst*. And this was allegded in arrest of judgment, and awarded good; and the plaintiff had judgment.

CASE 40.

If both the *venire* and the *distringas* are wrong the error cannot be amended. Post. 622. 3. Cr. 278.

Cottingham *against* Griffith and Snow, Sheriffs of Bristol.

DEBT upon an escape. The issue was *nihil debent*. The *venire facias* and *distringas* was, "*quandam juratam in placito transgressionis*;" and this after verdict was alledged in arrest of judgment. —And for this cause the judgment was stayed; for it is not aided by the statute of *jeofails*: but if the *venire facias* or *distringas* had been right, it had been otherwise.

Gurney

Gurney and K. Uxor *againſt* Sir Ed. Clere.

Case 41.

Trinity Term, 33. Eliz. Roll .

DEBT upon an obligation made to one *P.* and to the ſaid *K. dum ſola fuit.* After verdict it was moved in arreſt of judgment, that the defendant did plead, that whereas the condition of the obligation was, that whereas he had by his deed bearing date at *B. &c.* granted a rent of forty marks *per annum* to the ſaid *P.* and *K.* for their lives, payable at two feaſts, &c. if he accordingly paid the rent, that then, &c.; and alledgeth, that he always paid it to the ſaid *P.* and *K.* during the life of *P.* and to *K.* after his death, until the 24. *January* laſt paſt; at which day *G.* the plaintiff, having intermarried with the ſaid *K.* granted the rent to *J. S. &c.* and iſſue was taken upon it, *quod non conceſſit*, and found againſt the defendant.—And this was alledged to be no iſſue; for a grant of a rent is pleaded, but no attornment alledged (*a*), then the grant is void, and an iſſue cannot be taken of that which is not; and *Warner's Caſe* was cited to be adjudged in this court, when in an avowry the defendant preſcribed to have common to one hundred acres of land, the plaintiff traverſed, that he had not common to one hundred acres of paſture. And upon this iſſue was joined; and after verdict, it was adjudged to be no iſſue.—Second exception. The *venire facias* was of a wrong village; for the grant is ſuppoſed to be made at *B.* of a rent iſſuing out of the manor of *B.* and the *venire facias* was of *B.* where it ought to be of the manor of *B.* *Sed non allocatur*; for the iſſue being upon the grant, the *venire facias* ſhall be of the place where the *grant* is ſuppoſed to be made.—Third exception. The jury aſſeſſed damages to *baron* and *feme*, *ratione detentionis debiti*, where it ought to be only to the *baron*. *Sed non allocatur*; for the damages ſhall be to both.—But THE COURT doubted of the firſt exception. And it being moved again, GAWDY ſaid it is aided by the ſtatute of *jeofails*, for it is an inſufficient pleading: as if a man pleads a ſurrender, and pleadeth not an agreement, this is inſufficient; but if iſſue be taken upon the ſurrender, and the verdict find it, it is helped: ſo to plead a deviſe of a term, and ſheweth not the entry by aſſent of the executor, yet if iſſue be taken upon the deviſe, and the jury find it, this is aided by the ſtatute. And it was adjudged for the plaintiff.—And COKE ſaid it was adjudged in *Panier's Caſe* in this court, where one pleaded a concord, but pleads not ſatisfaction; and iſſue is joined, and verdict againſt the defendant; and it was adjudged good, and aided by the ſtatute.

If a grant of rent be pleaded without attornment, or a ſurrender without an agreement to it, or a deviſe without aſſent, and an iſſue on the grant, ſurrender or deviſe be found for the defendant, the miſ-joining is aided by 32. *Hen.* 8. c. 30. and the *ven. fac.* ſhall be where the grant, &c. is ſuppoſed to be made.

Poſt. 565. Co. 7. 2. a. Ant. 116.

Ant. 228. Poſt. 455. 3. Bac. Ab. 91. Ld. Raym. 90. B. R. H. 120.

(*a*) Rendered unneceſſary by 4. Ann. c. 16. ſ. 9. Dougl. 282.

Welſh *againſt* Upton.

Case 42.

TRESPASS. It was moved in arreſt of judgment after verdict, that the *venire facias* and the pannel were wanting; but the *diſtringas jurat'* and the pannel annexed to it remained.—And this was adjudged to be helped by the ſtatute,

The want of *ven. fac.* and pannel helped by the verdict. Ant 215. 257.

Cro. Car. 338. Bull. N. P. 320. Salk. 47. 3. Bac. Abr. 275.

Andrews *againſt* Kirke.

Case 43.

DEBT ON A BOND. The condition was to deliver fifty quarters of wheat. The defendant pleaded in bar, that he

A defendant ſhall not be allowed an advantage from the defect of his own plea. Ante, 235. 5. Co. 43. a. Moor, 692.

ANDREWS *against* KEEKE.

had delivered thirty quarters of wheat pending the bill, which the plaintiff had accepted, but ſhewed no deed, &c. Upon this iſſue was taken, that he had not accepted, &c. and found for the plaintiff. It was moved that it was no plea, ſo no iſſue.—But it was reſolved, that it was helped by the ſtatute; and the plaintiff had judgment.

CASE 45.

Wood *againſt* Butts.

If the defendant plead a ſurrender to the plaintiff's ſteward, the plaintiff ought to traverſe the ſurrender, not that the perſon receiving it was not his ſteward.

EJECTIONE FIRMÆ. The defendant pleaded a ſurrender of a copyhold by the hand of *Foſſet*, then ſteward of the manor. Iſſue was joined, ABSQUE HOC that he was ſteward.—All THE COURT held this no iſſue: for the traverſe ought to be general, that he did not ſurrender; for if he were not ſteward, the ſurrender is void; ſo of a ſurrender pleaded into the hand of the tenants of the manor. And it was held by THE COURT, that where iſſue is taken upon a ſurrender, it ſhall be tried where it was alledged to be done, and not where the manor is, of which the copyhold is holden: and in the principal caſe, a repleader was awarded,

Moor, 539. 574. 6. Co. 24. Cro. Car. 61. 105. 586. Vaugh. 10. 56. Lut. 1630.

CASE 46.

Braddiſh *againſt* Biſhop.

A fact alledged in a hundred or a ward only is bad; it muſt be the county; and the pariſh, hamlet, or place within the ſame.

ASSUMPSIT. The plaintiff ſhewed, that whereas the defendant at *London*, in *warda de Cheap*, was obliged to *J. S.* the defendant, in conſideration that the plaintiff would give, &c. at *London, in wardâ prædictâ, ſuper ſe aſſumpſit.* Upon *non aſſumpſit* pleaded, the *venue* was *de parochiâ de Arcubus in wardâ de Cheap*; whereas there was no pariſh mentioned before in the count. And this matter was alledged in arreſt of judgment, and exception taken to the count, that the promiſe was laid in a *ward*, and not in a pariſh within the ward, as it ought to be, 7. *Hen.* 6. *pl.* 36. Wards in *London* are as hundreds in the country, and the pariſh as the town; and as an act cannot be laid to be done in the hundred, ſo it cannot be in a ward.—WRAY, *Chief Juſtice.* An *aſſumpſit* or other matter is uſed to be laid in a pariſh; and it hath been ruled, if the trial be in another pariſh, it is ill.—GAWDY, *Juſtice*, agreed, 7. *Hen.* 4. *pl.* 13. a *venire facias* may be of a town, pariſh, manor, or other place known, but not of a city, county, or ward: and this is not helped by the ſtatute of 18. *Eliz.* c. 14. And ſo was the opinion of THE WHOLE COURT, and that the plaintiff cannot have a *venire facias de novo*, but muſt begin again; for the fault was in his count, and not by the award of the Court only (*a*).

Hob. 5. Cro. Car. 165. 5. Com. Dig. 30.

(*a*) But now the 21. Jac. 1. c. 13. gives aid after verdict where the *viſne* is awarded out of too many, or too few *places* in the county named. The 16. & 17. Car. 2. c. 8. goes further, and cures the *viſne* wholly if the cauſe was tried by a jury of the *proper county*. And the 4. & 5. of Ann. c. 16. in civil ſuits, and 24. Geo. 2. c. 18. in penal actions, direct that every *venire facias* ſhall be awarded from the body of the county in which the action is triable.—See Harg. Co. Lit. 125. a. n. [2].

CASE 47.

Horſeman *againſt* Johnſon.

On an iſſue whether the manor of *A.* is holden of the honor of *B.* the *venire* muſt be from both manors.

TRESPASS. The iſſue was, if the manors of *Perton* and *Great Huſely* were holden of the honor of *Ewelme*; and the *venire facias* was of one manor only.—And for this cauſe it was ruled to be ill; and the plaintiff taketh a *venire facias de novo* of both the manors, and the iſſue was tried for him.—COKE and TANFIELD

Poſt. 468. 3. Bac. Abr. 274.

alledged

alledged in arreſt of judgment, that the *venire facias* was not well awarded, but that judgment ought to be given, *quòd querens nihil capiat per billam*; for it is a miſ-trial, and a *venire facias de novo* was not to be awarded, but for the ſame jury, or where the verdict is not well examined; and the firſt verdict is here entered, and the writ filed; ſo there ſhall be two verdicts of record for the ſame thing, and both full. But it being moved again, THE COURT held it to be good, and the plaintiff had judgment,

HORSEMAN *againſt* JOHNSON.

Ford *againſt* Brooke.

CASE 48.

In juſtification of words the *venire* ſhall be where the juſtification ariſes. Poſt. 468.

ACTION for calling him a "perjured perſon," at *D.* in *Eſſex*. The defendant juſtified, for that the plaintiff was perjured in his anſwer in chancery at *Weſtminſter*, in the county of *Middleſex*, and ſo juſtifieth the words at *D.* The plaintiff replied, *de injuriâ ſuâ propriâ.*—The *venire facias* by the award of the Court was directed to the ſheriffs of *Middleſex*; for the juſtification ariſeth there, and the words were confeſſed. 1. Vern. 22. 1. Saund. 246.

The Queen *againſt* Harris.

CASE 49.

Another information for the ſame offence depending, may be pleaded in abatement to an information *qui tam*. Poſt. 325.

INFORMATION upon the 5. *Edw.* 6. c. 7. for buying of wools contrary to that ſtatute. The defendant pleaded as to all, except fifty ſtone of wool, not guilty; and as to the fifty ſtone he pleads, that there is an information depending againſt him for it in the common pleas, at the ſuit of *Lewis*; and avers, that they are for the ſame offence; and demands judgment, if as to them he ſhall be put to anſwer. And upon this it was demurred in law.

It was argued by GODFREY and ATKINSON *for the queen*, that it is no plea; for it is not alledged, that any writ or proceſs is ſued out upon the information, and then it cannot be ſaid to be depending, 7. *Hen.* 6. *pl.* 6. 10. *Edw.* 4. *pl.* 13.—Secondly, The information here ſuppoſeth the buying of the wool to be the 20. *Nov.* 31. *Eliz.* and the ſelling to be 6. *May*, the ſame year; and the information in the common pleas ſuppoſeth the ſelling to be the 6. *July*, 31. *Eliz.* ſo cannot be intended the ſame offence: and although the defendant hath averred it to the Court to be for the ſame offence, yet the averment is not material, when it appeareth to the Court it cannot be ſo, being at ſeveral days.

1. Roll. Rep. 49. 2. Hawk. c. 26. ſ. 63. Sed vide Ch. 34. ſ. 1. Roll. Rep. 49. 134. Hob. 138. 209. Salk. 89.

But all THE COURT, except GAWDY, held the plea good. For they ſaid, that immediately when the information is brought into court, it is entered upon record: and this containeth all the ſubſtance of the matter, and in this point is not like other writs; and therefore ſhall be ſaid to be immediately depending, although no writ or proceſs is ſued upon it: and this appeareth by the expreſs words of the ſtatute of 18. *Eliz.* c. 14.—Secondly, It is a good plea with an averment; for otherwiſe, by the falſe ſuppoſal of the day, when the offence is committed, the defendant ſhall be put to double trouble. But GAWDY doubted of theſe matters.—Yet at another day, it being again moved, the plea was adjudged ſufficient: and it was adjudged for the defendant.

Cro. Jac. 4 Dougl. 2 3. Burr.

CASE 50.

Rockwood *againſt* Feaſar.

A plea which confeſſes and avoids the plaintiff 's title is good, though the matter may be given in evidence on the general iſſue. Sed vide Latch. 185. Ant. 146. Poſt. 555.

3. Lev. 41. 1. Salk. 394. 2. Salk. 654.

ACTION of trover in *London*. The defendant pleaded, that long time before the converſion ſuppoſed to be, *J.S.* was poſſeſſed of theſe goods, as of his own goods, at *B.* in *Norfolk*; and that he before the converſion ſuppoſed did caſually loſe them, and they came to the hand of *J. Palmer* by trover, who gave them to the plaintiff, who loſt them in *London*; and the defendant found them, and afterward did convert them to his own uſe, by the command of the ſaid *J. S.* as it was lawful for him to do. It was moved, that this is no plea, for it amounts to the general iſſue.—But all THE JUSTICES held it a good plea; for it confeſſeth the poſſeſſion and property in the plaintiff, againſt all but the lawful owner.—NOTA. This plea was deviſed by COKE to alter the trial.

CASE 51.

Wood *againſt* Hamſtead.

To treſpaſs on a diſtreſs for rent, a plea that it was behind *by* the ſpace, inſtead of *after* a ſpace, of ſo many days, is bad. Ante, 88.

1. Ld. Ray. 228. Dougl. 463. 434.

TRESPASS for taking the cattle of the plaintiff. The defendant pleaded, that he was ſeiſed of the land in which, &c. and let it to *A.* rendering rent at the feaſt of *Eaſter*; and if it be arrear at the ſaid feaſt and ten days after, that he might re-enter; and ſaith, at the feaſt of *Eaſter*, in the year of, &c. the rent was behind, and by the ſpace of ten days after; and thereupon he re-entered and diſtrained the cattle, damage-feaſant. And upon this it was demurred.—Firſt, That he ſaith he let to *A*, but ſaith not *virtute cujus* he entered and was poſſeſſed; for it may be the leſſor did not waive the poſſeſſion, and then no rent is due.—Secondly, That he ſaith the rent was behind *by* the ſpace of ten days, where it ſhould be *after* the ſpace of ten days; as in *Browning v. Beſton, Plow. Com. f.* 3. there is no mention of the day and year of the leaſe, but ſpaces left for them.—For theſe cauſes, and principally for the ſecond, it was adjudged for the plaintiff.

CASE 52.

Dr. Hunt's Caſe,

The ſpiritual court cannot adminiſter the oath *ex officio*, but where the matter is within their juriſdiction, and the offence has been previouſly preſented. Ante, 201.

2. Inſt. 657. Hard. 364. Cro. Jac. 388. Hob. 84. Salk. 550. Strange, 80.

HE was indicted, that whereas by the law of the land no perſon is to be cited into the ſpiritual court to take any oath, but in caſes of matrimony and teſtamentary; that he, being commiſſary of the archdeacon of *Norfolk*, had cauſed *J. Bodingley* to be ſummoned to appear before him at a place, &c. to compel him to take an oath concerning incontinency, which touched himſelf, againſt his will (*a*).—WRAY. This cauſe was referred to the Lord ANDERSON, and the Lord Chief Baron, and to myſelf, to certify if the miniſtring of this oath be againſt the law. And we certified in this manner: Where the knowledge of the matter did belong to the court chriſtian, they may proceed according to the civil law.—GAWDY. The oath cannot be miniſtred to the party, but where the offence is preſented firſt by two men, *quod fuit conceſſum*; and it was ſaid, it was ſo in this caſe.

Barnes, 45. 5. Com. Dig. 480. 3. Bl. Com. 101, 447.

(*a*) See 13. Car. 2. c. 12. by which the oath *ex officio* is aboliſhed.

33. and 34. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Hugh Wyndham, *Eſq.* } *Juſtices.*

Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Soliciter General.*

Elmer et Uxor *againſt* Thacker.

CASE 1.

Quod ei deforceat does not lie upon a recovery by *nihil dicit*, but only upon a recovery by default before appearance.

QUOD EI DEFORCEAT of lands, of which the wife was tenant in dower The defendant pleaded a recovery againſt the wife, *dum ſola fuit*, in a writ of waſte by *nihil dicit*; and that he releaſed the damages, and had judgment to recover the land. The demandants replied *null waſte fait*, and ſo would avoid the recovery; and thereupon the tenant demurred.—After argument by the ſerjeants, all THE JUSTICES delivered their opinions, that this writ lieth not upon a recovery by *nihil dicit*; for the ſtatute (*a*) doth not give this writ but upon a recovery by default, which is intended before appearance; but this is upon a *nihil dicit*, which is no default, but as a departure in contempt of court, or rather a confeſſion of the action, and a not denying of the waſte; for in this caſe the waſte is confeſſed, and no writ ſhall be awarded to enquire of the waſte, but only of the damages. This judgment is *quaſi* by her own aſſent, for that ſhe will not plead; and the Court takes it as her acknowledgment, that ſhe hath nothing to plead againſt it; and the ſtatute that is made only for her benefit, and to relieve her againſt her default, ſhall not relieve her againſt her contempt, or rather her own act. And whereas it was ſaid, that a *nihil dicit* is taken as a default, for a receipt ſhall be by a termor or *feme-covert* after a *nihil dicit*, as 9. *Edw.* 4. *pl.* 37. is; and that a receipt ſhall be by a *feme* after a writ of enquiry of waſte, and returned, and the waſte inquired, that it is not like to this caſe; for the ſtatute that giveth receipt is for the benefit of a ſtranger, that they ſhall not loſe their right by the default or negligence of the party that was to plead; and ſo a *nihil dicit*, or default, is all one to them. But here this ſtatute is for the relief of the party againſt whom judgment is given by default, and ſo are not like. And this is not a judgment by default, but rather a departure in contempt of court, or a *nient dedire*, or *quaſi* a confeſſion of the action; which is proved, as PERIAM ſaid, by the caſes in *Comment' et Dyer*, that in a debt againſt the heir, if judgment be upon a *nihil dicit* againſt him, execution ſhall be againſt him of his own land: for in a manner he confeſſeth that he is chargeable, and hath aſſets. And ANDERSON and PERIAM held ſtrongly, that if judgment had been given by default in waſte, that upon ſuch a recovery a *quod ei deforceat* did lie, eſpecially in this caſe, when the damages are releaſed; and ſo the waſte is not found by inqueſt. WYNDHAM *è contra*, as to this point. But in the principal cauſe, they all reſolved *ut ſupra*; and it was thereupon adjudged for the defendant. *Vide* 15. *Ed.* 3. "*quod ei deforceat*," 9. *Co. Lit.* 355. a. b.

2. Inſt. 351.

Ante, 18.

(*a*) Weſt. 2d. c. 4.

CASE 2.

The Sheriffs of Glouceſter's Caſe.

Sheriffs are intitled to fees for executing judgments given in any courts except thoſe of cities and towns corporate, &c.

Dalt. 527. Moor, 853. Latch. 19. Palmer, 400. Salk. 331. Pop. 173. 5. Mod. 97. 1. Cr. 287. 2. Ld. Raym. 1212. 2. Term Rep. 755.

INFORMATION upon the 29. *Eliz.* c. 4. againſt them for taking above twelve pence in the pound for executing proceſs upon a judgment in the common pleas. The defendants pleaded the *proviſo* in the ſtatute, wherein all cities and corporations and their officers are excepted. Upon which it was demurred. For OWEN, *ſerjeant*, moved, that this *proviſo* extended only for ſerving of executions upon judgments in their courts, but not upon executions of judgments in other courts; and ſo it may be collected by the preamble and body of the act.—But all THE COURT *contra*. For it ſhall be expounded as well for ſerving executions upon judgments in other courts, as in their own courts. And whereas it was objected, that the county of the city of *Glouceſter* extends four or five miles further than the city, and that this execution was not in the city, but within the county of the city; and ſo it is not within the *proviſo*; THE COURT ſaid, if it had been ſo pleaded, peradventure it ſhould be otherwiſe; but as it is pleaded, it appears not to the Court; and thereupon it was adjudged for the defendant.

CASE 3.

Buſh *againſt* Redgeley.

Upon a bond to ſave the plaintiff harmleſs, he is damnified the moment judgment is given; and the defendant cannot avoid the penalty by a ſubſequent payment of the debt.

Ante, 53. Poſt. 369.

5. Co. 24. a. 2. Vent. 36. Owen, 19. Cro. Car. 349. Cro Jac. 288. 340. Yelv. 207. 2. Bulſt. 94. 105. 2. Term. Rep. 388.

DEBT upon an obligation. The condition was, to ſave the plaintiff harmleſs againſt *J. Robinſon* of one obligation. The defendant pleaded *non damnificatus*. Plaintiff replied, that *Robinſon* had ſued him to the *exigent*; and then he appeared, and the ſaid *Robinſon* had judgment to recover againſt him, upon the obligation *et iſſint* damnified. The defendant rejoins, that he himſelf had retained an attorney for the plaintiff on the ſaid ſuit, and the plaintiff was at no expences, nor was arreſted upon it, nor his goods or lands ſeized; and that after the judgment he was not damnified. Upon this the plaintiff demurred.—And all THE COURT reſolved for the plaintiff, for that immediately upon the judgment given, he was damnified; for his body, goods, and land are liable to the execution: and if he afterwards alieneth his land, he cannot by reaſon of this judgment warrant it to be free of incumbrances; ſo that by the very judgment he is damnified; and if the defendant after the judgment had paid the debt, it would not ſerve, for he was damnified before.

CASE 4.

Brewſter *againſt* Sir Thomas Parrot.

Debt does not lie for rent upon an expired leaſe.

8. 523.

2. Co. Dig. 637. 3. Bac. Ab. 401.

THE caſe was, Leſſee for life makes a leaſe for years, rendering rent, and after ſurrenders to the leſſor upon condition. The leſſee for years takes a new leaſe for years of the leſſor; the leſſee for life performeth the condition, and puts out the leſſee for years, who re-enters; and the leſſee for life brings debt for the firſt rent reſerved.—And ruled it doth not lie; for the leaſe out of which it was reſerved, is gone and determined.

CASE 5.

Offely *againſt* Bat.

Eaſter Term, 33. *Eliz. Roll* 403.

Conuſee of a fine cannot diſtrain before attornment.

Poſt. 354.

Owen, 23 2. And. 15.

THE caſe was, Conuſee of a fine of a reverſion before attornment (*a*) ouſts the leſſee, and makes a feoffment. The leſſee re-enters, and the feoffee diſtrains for the rent.—PERIAM and WYNDHAM held, that he could not diſtrain no more than the feoffor himſelf before attornment. *Vide Co.* 5. 113. a.

(*a*) Attornment is now rendered unneceſſary by 4. Ann. c.

Scriven *againſt* Prince.

CASE 6.

FORMEDON of three meſſuages and certain acres of land. For part of the acres of land they were at iſſue; and found for the demandant; and as to the reſidue of the acres the tenant vouched. For the meſſuages they were at iſſue upon a *non-tenure* pleaded; and the jury found he was tenant of one of the meſſuages, and not of the other; but ſheweth not of which in certain.—THE COURT held, that for the acres, and the houſe of which the verdict is found, the plaintiff may have judgment; and a writ to the ſheriff to deliver ſeiſin; and the plaintiff at his peril is to ſhew to the ſheriff what meſſuage it was the jury did intend, for the jury is not tied to ſet bounds to it; and he need not ſtay for his judgment till the voucher be determined.

Execution of a writ of poſſeſſion. Poſt. 465. Cro Jac. 113. 1. Burr. 139. Dougl. 473.

Michaelmas Term,

38. and 39. Eliz. In the Exchequer.

Sir Roger Manwood, *Knt.* *Chief Baron.*
Edward Flowerdew, *Eſq.*
Thomas Gent, *Eſq.* } *Barons.*
Matthew Ewens, *Eſq.*

The Queen *againſt* Fairclough.

CASE 1.

INFORMATION in nature of an action of treſpaſs, for taking and cutting certain trees of which the queen was poſſeſſed. The caſe upon ſpecial verdict was this: *Andreas de Lowe*, and twelve others were poſſeſſed of divers trees by the grant of the owner of the ſoil; and the ſaid *Andreas* for and in ſatisfaction of a debt which he did owe to the queen, aſſigned to her by deed inrolled all the trees. The queſtion was, If the queen ſhould have, by this aſſignment, all the trees? 8. *Edw.* 4. *pl.* 24. 19. *Hen.* 6. *pl.* 47. *Comment.* 243. & 323.—COKE *for the defendant* did agree, that where the queen came to an entire thing by act in law, as attainder or other act in law, ſhe, by her prerogative, ſhall have the whole; but where ſhe cometh to have part of the chattel by the grant of a common perſon, he by his grant ſhall not prejudice his companion; and therefore in that caſe the queen ſhall not have her prerogative. *Quære of this difference.*—THE BARONS did not ſpeak to the caſe, but they ſaid it was ſtrong againſt the defendant; and they gave him day to take advice, if he could ſay any other matter.

Prerogative. 3. Leon. 240. Hale on Fitz. 32. 1. Roll. Rep. 7. Litt. Rep. 91. Gouldſ. 20. Hardres, 26. 470. T. Ray. 7. 121. 3. Inſt. 55.

The

CASE 2.

The Queen *againſt* Wall and Green.

Lands of a *conuſor* extended at a certain ſum *per ann.* by the executors of the *conuſee*, are not liable to diſcharge a recognizance by the ſame *conuſor*, which has come to the king by an outlawry of another *conuſee*, upon a *ſcire facias* againſt the executors of the conuſor, although it appear that the lands yield a ſurplus.

3. Com. Dig. 646. 651.

SCIRE FACIAS. The caſe was, *J. S.* was bound to *Green* in a ſtatute of 400l. and his land extended for this debt, and delivered in execution at the value of 5l. *per annum*. He was alſo bound in a ſtatute to *J. D.* who aſſigned it to the queen for his debt; and thereupon an *extendi facias* being awarded, it was found that the land delivered to *Green* in extent was worth 12l. *per annum*; and thereupon a *ſcire facias* was awarded againſt them to anſwer the ſurpluſage of the profits above the ſaid five pounds to the queen. The queſtion was, If it were duly awarded?

MANWOOD *and all* THE BARONS held it was, for it being found that there was a ſurpluſage above that which would ſerve a common perſon, the queen ſhall have it by her prerogatvive.

GLANVIL, *ſerjeant*. I will plead this at all peril.—CURIA. And you ſhall have a ſhort rule.

NOTA. Afterwards all this matter was pleaded upon the *ſcire facias*; and the caſe was this: A recognizance of 1000l. was acknowledged by *J. S.* to *Comb.* 20. *Eliz.* and afterwards 26. *Eliz.* the ſaid *J. S.* was bound in a recognizance to *Mabb* in 1000l. 27. *Eliz. Wall* and *Green* executors of *Comb* ſued execution of the firſt recognizance, and the land of the conuſor was extended at 20l. *per annum*. Afterwards *Mabb* was outlawed, by which the recognizance to him came to the queen; and proceſs of extent iſſued for the queen, and it was found that the conuſor had nothing but the land extended by *Wall* and *Green*; and that it was worth (above the twenty pounds it was extended at) 40l. *per annum*: and hereupon *ſcire facias* was awarded againſt *Wall* and *Green* to anſwer the queen for the ſurpluſage above the yearly value that the extent was; and they pleaded their firſt extent by inquiſition; and that they were not yet ſatisfied. And hereupon it was demurred, which did depend till *Mich.* 38. & 39. *Eliz.* And then it being moved by KINGSMILL, *ſerjeant*,

PERIAM, *Chief Baron*, and EWENS, *Puiſne Baron*, held clearly, that the queen ſhall not have any ſurpluſage; for by the extent they had an intereſt and term in the land, which ſhall not be diveſted by the finding of the ſurpluſage afterwards: and the value is not material; for though it be now of ſo great a value, yet it may be before the time of the extent incurred, it will be of a leſſer value; and the conuſee is to bear the hazard: and the queen hath no ſuch prerogative to diveſt it from the ſubject, it being lawfully veſted in him, eſpecially this debt accruing to the queen by a common perſon.—But CLERKE, *ſecond Baron*, held ſtrongly the contrary; for it is the queen's prerogative to be ſatisfied of her debt by any means; and it is no miſchief to the conuſee, for he ſhall have as much anſwered to him, as the land is extended at.—But judgment was given for the defendants that they ſhould be diſcharged.

By 7. Jac. 1. c. 15. no debt ſhall be aſſigned to the king which was not originally due to his debtor or accountant.

Hilary

Hilary Term,

34. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Pollard *againſt* Lock.

CASE 1.

Trinity Term, 31. *Eliz. Roll* 810.

An ambiguity in a criminal information ſhall not be cleared by intendment. Ante, 127. 3. T. Rep. 513.

INFORMATION upon the 5. *Eliz.* c. 9. for perjury. And declares, that whereas *J. R.* brought treſpaſs againſt him, and he pleaded not guilty, and the plaintiff intitled himſelf by a feoffment of the land, he ſhewed a court-roll held before J. LOCKE, *Gent.* which proved it was copyhold; *prædict'* J. LOCKE *falsò depoſuit*, "that he was not ſteward at that time," *ubi revera* he was then ſteward, whereby the verdict paſſed againſt him, &c. After verdict, it was alledged in arreſt of judgment, that the declaration is inſufficient, for here are two *J. Lockes* mentioned, *viz.* the defendant, and *J. Locke* ſteward, and ſo may be intended another man: and when it is ſaid *prædict' J. Locke depoſuit*, this ſhall be intended to refer to him that was laſt named, and not to the defendant; and every declaration ought to be certain, and ſhall not be taken by intendment.—And for this cauſe it was adjudged for the defendant. *Vide* 10. *Hen.* 7. *pl.* 5. *B.* 5. *Hen.* 5. *pl.* 8, 6, *Edw.* 6. *D.* 70, 21, *Hen.* 7. 30. *B.*

Wing *againſt* Earle.

CASE 2.

Vide Ante, Page 258. *Caſe* 3.

Miles ſhall be according to Engliſh form, and not geometrical computation. Ante, 212.

THE caſe was again moved,—GAWDY ſaid, The ſtatute is private, and not being pleaded the Court is to take no notice of it; and ſo the other matter came not in queſtion: yet he held, that a mile ſhall be accounted according to the *Engliſh* form, and not according to the geometrical computation. And if one ſells land, and is obliged that it containeth twenty acres, this ſhall be according to the law, and not according to the cuſtom of the country.

FENNER. If the queſtion had been upon the ſtatute, the miles ſhall be conſtrued according to the uſual ways for carriages; but upon the condition, if it be within four miles any way, the condition is broken.—Wherefore it was adjudged for the plaintiff.

Pendlebury

Case 3.

Pendlebury *against* Elmott.

In battery and wounding if the defendant justifies the battery, but says nothing as to the wounding it is a bad plea; but *son assault* would answer all.

TRESPASS for assault, battery and wounding. The defendant said he was constable of *D.* and for such a misdemeanour of the plaintiff he laid his hands on him, and carried him to the stocks, *quæ est eadem transgressio.* Upon this it was demurred,—And adjudged for the plaintiff; for the defendant did not plead *not guilty* to the wounding, nor justified it: but if one pleads that the hurt which the plaintiff had was of his own assault, this is a good answer to all. And the plaintiff had judgment. 1. *Saund.* 27.

March. 47. 2. Cro. 27. 2. Mod. 330. 1. Saund. 14. 28. 2. Vent. 193. 1. Roll. 176. 406. 2. Saund. 127. Lut. 1355. But if the defendant answers in sense, though not in words, it is sufficient. Ante, 255. 1. Salk. 408. Raym. 469. 6. Mod. 705. 1. Lev. 31. 3. Lev. 404. Laugh. 188. 3. Roll. 466.

Case 4.

Browne *against* Pendlebury.

Trinity Term, 32. *Eliz. Roll* 154.

Debt will lie for the arrears of annuity by *deed as a contract*; and *adhuc aretro existit*, is well enough to shew it was in arrear. Ante, 3. Post. 895. 1. Bulst. 151. 5. Mod. 143. 1. Bac. Ab. 119. 2. Bac. Ab. 14.

DEBT. For that the defendant 4. *Aug.* 32. *Eliz.* granted to him an annuity of five pounds *per annum* for two years, payable at *Michaelmas*, or within sixteen days after; and declareth, that it was behind at *Michaelmas, et adhuc aretro existit.*

Upon this declaration it was demurred.—FIRST, Because it is not averred that it was arrear sixteen days after *Michaelmas. Sed non allocatur*; for it being alledged, that *adhuc aretro existit*, which is long time after the sixteen days passed, it is well enough.—SECONDLY, That debt lieth not for this annuity during the two years, but a writ of annuity. CURIA *contra.* That debt lieth, being a grant for years, for it is by the deed as a contract.

Case 5.

Fowler *against* Aston.

Words not importing a certain charge of some offence, are not actionable. Ante, 192. 1. Co. Dig. 288. 2. T. Rep. 473.

ACTION for these words: "I am put out of the parsonage-"house by *Fowler*, the patron, who is neither the queen's "friend, nor a true subject." After verdict it was alledged in arrest of judgment, that the words were not actionable; and so it was adjudged 16. *Eliz.* between *Burstcd and Peck*, that these words, "He is not the queen's friend," will not bear an action.—And afterwards in this term it was adjudged for the defendant, that the words are not actionable.

Case 6.

Stanley *against* Osbaston.

It is actionable to call a shoemaker a bankrupt. Cro. Car. 31. Cro. Jac. 345. 584. Skin. 292. 3. Mod. 330. Ld. Ray. 1480. 2. Stra. 762.

ACTION for these words: "He was a bankrupt;" and alledged he was a shoemaker, and used buying and selling of leather.—And it was adjudged that the action did lie, although the plaintiff was not a merchant, but he got his living by buying and selling.

Case 7.

Seyman *against* Okeley.

Easter Term, 33. *Eliz. Roll* 443, *or* 93.

A release of all demands to a tenant at will does not increase his estate. Co. Lit. 270. 291. b. 5. Co. 56. a. Cro. Jac. 170. 623. 1. Sid. 141. Dyer, 28. 3. Leon. 152.

TRESPASS. The defendant pleaded that *Frier* was seised in fee, and let to him at will; and afterwards released to him all

accompts,

accompts, suits, and demands, *ab initio mundi*, until the day of the date, by which he was seised for life; &c. The question was, If the estate of the lessee at will was increased?—And, upon motion, resolved by THE WHOLE COURT, that the estate is not enlarged. And the plaintiff had judgment.

SEYMAN *against* OKELEY.

Underhay *against* Underhay.

CASE 8.

Trinity Term, 31. *Eliz. Roll* 669.

EJECTIONE FIRMÆ. It was found by special verdict, that *J. S.* made a lease for three lives; and after let the land to *Willmot*, HABENDUM to him for his life, "which said term to be-"gin and have its being after the death, surrender or forfeiture of "the three lives." And livery was made *maintenant*. The question was, If this were a good lease, because the words "*which* "*said term*" appoints that nothing shall begin till after the death, &c.?—And it was adjudged that forasmuch as the estate was fully limited before the words "*which said term*," those words are vain and idle; for *utile per inutile non vitiatur*.

A lease habendum to the lessee for his life, which term shall begin after the determination of a previous term for three lives, is good: *Ante*, 254.

Moor. 881.

2. Roll. Abr. 66. Hob. 171. Burr. 1975. 2210. 2. Bac. Abr. 498.

Perkins *against* Perkins.

CASE 9.

Hilary Term, 33. *Eliz. Roll* 520.

THE case upon special verdict was, The father was tenant for life, the remainder to *Thomas* and *Drew* his sons for their lives. *Drew* purchased the reversion in fee; the father and *Thomas* surrender to him without deed. The question was, If this be a good surrender?

FENNER. The surrender is void; for if it be good, it must first be the surrender of him in the remainder, which cannot be *without deed*; and it cannot be the surrender of the first tenant for life to him in the remainder, for there is no word of surrender between them (*a*)

A surrender cannot be made by tenant for life and remainder man to the reversioner in fee, without deed or words of surrender.

2. Ro. Ab. 498. 2. Ro. Rep. 20.

Co. Lit. 338. a. 5. Com. Dig. 510. 1. Saund. 151.

(*a*) See 29. Car. 2. c. 3. f. 3. and 23. Geo. 3. c. 58. f. 1.

Wigford *against* Gill.

CASE 10.

TRESPASS. The case was, *J. S.* erected a mill-dam, part upon his own land, and part upon the land adjoining; the owner of the land adjoining pulls down the dam upon his land, by which all the dam falls down; and the water did run out.—All THE COURT held it was justifiable. So if one erects a wall upon his own lands, and the land of his neighbour, and the neighbour *pulls* down the wall upon his land, and thereupon all the wall falleth down, this is lawful.

Trespass will not lie for an injury which is the consequence of a legal act. Co. 5. 101. a. b. *Ante*, 118. 2. Salk. 459.

The Lord Vaux's Case.

CASE 11.

LORD VAUX levied a fine to the *use* of himself for life, and after his death to the use of his two daughters, till *Ambrose* his son returned from beyond the sea, and came to his full age, or died, which of the said times, days or hours, came first, and then it should remain to *Ambrose*. He returned from beyond the sea, and came of age *or* died, which ever shall first happen, and then to *B.* this is a good remainder, and shall vest in *B.* immediately on his return, though not of age. Co. Lit. 225. a. Moor. 239. 1. Leon. 243.

A fine to the use of himself for life, with remainder to *A.* until *B.* returned from sea,

Lord Vaux's Case.

The question was, If this remainder be good? and if it be, When it should commence in him, if before his full age?

By all the Justices, the remainder is good; for although his coming to his full age, or from beyond sea, be uncertain, yet his death is certain, and so it doth not meerly depend upon uncertainties. 4. *Mar. Dyer*, 142. *A.* deviseth to *Avice* his wife for life, *si tam diu sola vixerit*, and after her marriage or death, the remainder over, it is admitted a good remainder, 13. *Eliz.* 300. (*a*) And they agreed the daughters had an estate for their lives conditionally. 3. *Ass.* 9. 11. *Ass.* 8.

(*a*) 2. Leon. 82. 3. Leon. 182. 3. Co. 20. Dyer, 142.

Wray, *Chief Justice*, said, that the words disjunctive (*or &c*) being in the end of the sentence, make the copulatives before to be disjunctives; so that if one of them be accomplished, the remainder doth vest: and he was induced to it by *Truepenny's Case* in the common pleas, 31. *Eliz.* where the case was, The husband made a lease for years, if he and his wife *or* any child of their bodies shall so long live; the wife dieth: and it was adjudged that the lease continued; for the disjunctive that came last made the copulatives before to be of the same nature; and judgment was given in the principal case accordingly. And afterwards a writ of error was brought in the exchequer-chamber; and it was ended by composition.

Nota. Gawdy said, that if a lease be made to one until *A.* cometh to his age of twenty-one years, and then it shall remain over to another, this is a void remainder; and it is not like a lease for years, the remainder over. But Fenner and the other Justices were of the contrary opinion in that case.

A lease to two for years if they or any issue of them so long live, continues during the life of the survivor.

Nota. The *Case of Truepenny* cited before, was between *Baldwin and Coke*, and it was thus: *A.* having an intent to marry *B.* one of the friends of *A.* and for the preferment of *B.* made a lease to *A.* and *B.* for sixty years, if *A.* and *B.* *or* any issue of their bodies so long live: and it was adjudged that the lease doth continue as long as any of them live, for so was the intent of the parties. And Anderson commanded Nelson *the prothonotary* to enter upon the record, that the lease continued so long as any of them live. *Vide Co. Lit.* 225. a.

Owen, 52. 3. Leon. 74. 1. And. 161. Co. Lit. 225. 431. 4. Bac. Abr. 309. Moor, 239. 372. Goldf. 71. Dalis. 2. Cro. Jac. 71. 1. Wilf. 262. 1. Bac. Abr.

Case 12.

Ridgeley *against* the Hundred of Warrington.

The hundred is answerable for a robbery committed in any time of the night in which men commonly travel. Post. 954.

Action upon the statute of hue and cry.—Upon the evidence it was held by Anderson and all the Justices, that whereas the statute speaks of robberies done in the day before night, yet if a robbery be committed in the morning before day, or in the evening after the day, in *any time* of the night in which men use commonly to travel, that the hundred is answerable for it; but if it be at twelve or one of the clock in the night, at which time every one is intended to be in bed, the hundred is not answerable for the robbery.

7. Co. 6. b. Cro. Jac. 106. 1. Sid. 263. 1. And. 159. Stiles, 233. 2. Hawk. P. C. 117. Wood's Inst. 364.

Case 13.

Ognell's Case.

The lessee of an outlaw shall have trespass for the profits received between the assignment and the reversal.

Trespass. The case was upon special verdict, that a termor being outlawed for felony, granted his term and interest to

Post. 278. 8. Co. 143. a. 1. And. 188. 2. Lev. 49. 2. Ver. 313. 13. Co. 20. 22.

the plaintiff, who is put out by *J. S* and afterwards the outlawry is reverſed; and the plaintiff brought treſpaſs for the profits taken between the outlawry reverſed and the aſſignment. And the queſtion was, If the action did lie? for that during that time the queen had the intereſt, and the aſſignee had no right.—And it was adjudged for the plaintiff; for by the reverſal, it is as if no outlawry had been; and there is no record of it. Ognell's Case.

Johns *againſt* Philips. Case 14.

Michaelmas Term, 33. & 34. *Eliz. Roll* 2101.

SECOND DELIVERANCE. The caſe was, A woman made a leaſe for life, and afterwards granted the reverſion for 1000 years; and before attornment ſhe takes *J. S.* to huſband, and afterwards the tenant attorned to the grantee. Attornment too late after the marriage of the grantor. Co. Lit. 310. b. 1. Com. Dig. 433.

THE COURT reſolved, and agreed, that the *attornment* came too late (*a*): but for ſome faults in the pleading no judgment was given.

(*a*) See 4. & 5. Ann. c. 16. by which the neceſſity of attornment is taken away.

William Richbell *againſt* Edward Goddard. Case 15.

Trinity Term, 33. *Eliz. Roll* .

ACTION upon the caſe againſt the defendant, ſheriff of the county of *Southampton*. That whereas *J. Gold* being indebted to him by two ſeveral obligations, one payable 21ſt *Nov.* 33. *Eliz.* he on the 17th *Nov.* 33. *Eliz.* procured a *latitat* out of the queen's bench, returnable *Octabis Hillarii*, intending to declare againſt *Gold* upon theſe two bonds, which writ was delivered to the defendant 20th *Nov.* 33. *Eliz. apud S.* and the defendant by force thereof, 4. *Dec.* 33. *Eliz.* did arreſt *G.* at *S.* and afterwards 14. *Dec.* 33. *Eliz.* ſuffered him to eſcape at *London*, by which the plaintiff loſt his debt. Upon not guilty pleaded, it was found for the plaintiff. The ſheriff is anſwerable for an eſcape, though the writ was ſued out before the debt was due, if the party was arreſted after; and the trial ſhall be where the eſcape, and not where the arreſt was made. Ante. 165. Poſt. 625.

It was alledged in arreſt of judgment,

FIRST, That this proceſs was taken out before the debt was due upon one of the obligations; and then the plaintiff had no cauſe of action for it; and ſo being an entire ſuit, it ſhall abate in all.—*Sed non allocatur*; becauſe the arreſt was after the debt was due; and this (if a good plea) was to be pleaded by the party himſelf, and not by the ſheriff, for he muſt anſwer his own *tort*. 7. Co 2. a. Poph. 205. 2. Saund. 100.

SECONDLY, It was alledged that there was a miſ-trial, being tried in *London*, whereas the iſſue NOT GUILTY refers to the whole matter; and the arreſt which was the principal was at *S.* and without it there can be no eſcape, and the trial ſhould be of *S.*—*Sed non allocatur*; for the eſcape is the matter upon which the action is grounded, which was alledged to be at *London*; and the viſne ſhall be of the place where the eſcape was, and not of the place where the arreſt was. And it was adjudged for the plaintiff.

Smalbroke

Case 16.

Samlbroke *against* Dabridgecourt.

Hilary Term, 34. Eliz. In the Exchequer Chamber.

Vide Ante, page 178. *Case* 9.

A promise to an under-sheriff to save the sheriff harmless from escape, *in consideration* that he will permit a particular person to execute the writ, is good. Ante, 84. 178.

ERROR of a judgment in the queen's bench. The errors were assigned by GODFREY.

FIRST, That there was no consideration; for it was no benefit to the plaintiff to take the body of *Lane*, and it was the sheriff's duty to execute the process.—*Sed non allocatur*; for he being an officer appointed by *S.* the now plaintiff, it is no reason the sheriff should be at any loss by his appointment; and therefore it was a good consideration.

SECOND ERROR. This *assumpsit* cannot discharge a future escape.—*Sed non allocatur.*

THIRD ERROR. The escape is alledged to be 8th *Novemb.* 29. *Eliz.* and the defendant answered to an escape 30th *Decem.* 30. *Eliz.* —*Sed non allocatur*; for the plaintiff may alledge it at any day, and the defendant may answer to it according as the truth is.

FOURTH ERROR. That this *assumpsit* is in nature of a bond, and so against the 23. *Hen.* 6. c. 10.—*Sed non allocatur*; for as the party may discharge a prisoner in execution, so he may foreclose himself from the benefit, if the prisoner escapes, and the statute never intended to help him that foreclosеth himself.

FIFTH ERROR. That there was no *venire facias*.—*Sed non allocatur*; for that is to be alledged by way of diminution; and the *venire facias* is never certified; and this is after verdict, and so cannot be alledged. And the judgment was affirmed.

Case 17.

Tenancy *against* Browne.

What certainty is sufficient in averring performance of a condition precedent.

ERROR of a judgment in the queen's bench, upon a promise.

FIRST ERROR. That the plaintiff in the action declared, that whereas the defendant was indebted to him in ten pounds, he did assume that if the plaintiff would forbear him one week, that he would pay it; and alledges, that he did forbear him for one week, but saith not for one week following.—*Sed non allocatur*; for it cannot be otherwise intended.

The qualification required of jurors, does not extend to 28. *Edw.* 3. c. 13. Post. 841. 2. Hawk. 590.

SECOND ERROR. For that the plaintiff being an alien, the trial was *per medietatem linguæ*, and the *venire facias* was *quorum quilibet habet* four pounds land, whereas an alien can have no land—*Sed non allocatur*, for it shall be referred only to the *English*. And the judgment was affirmed.

Easter

Eaſter Term,

34. Eliz. In the Queen's Bench.

Sir Chriſtopher Wray, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Jordan *againſt* Lyſter.

CASE 1.

In an action for calling a merchant a bankrupt, *quòd fuit mercator per magnum tempus* is ſufficient. Poſt. 794. Cro. Car. 282. Cro. Jac. 222. 107. 444. 673. 4. Bac. Ab. 513.

ACTION for words: "What art thou? A bankrupt, and "waſt a bankrupt." After verdict, COKE moved in arreſt of judgment, that the declaration was, *quòd cùm fuit mercator per magnum tempus, &c.* but ſaith not he was a merchant at the time of the ſpeaking the words, and therefore the declaration is inſufficient; and the words here are interrogative and not direct.—But THE COURT held the declaration to be good, being alledged that he was *per magnum tempus* a merchant, &c. and that his anſwer to the interrogation is a direct affirmance; but they would adviſe, &c.

Marſhe's Caſe.

Ante, Page 225. *Caſe* 10.

CASE 2.

A writ of error lies by an executor to reverſe the outlawry for felony of his teſtator. Ante, 225. 1. Leon. 325. Owen, 147. 1. Roll. Abr. 558. Godb. 377. 380. Swinb. 367. 2. Hawk. 654. 1. Salk. 295.

THE caſe was argued by ALTHAM, that the writ of error lieth by the executors, for the loſs of the goods which they ſhall otherwiſe have; for it may be he had no lands, nor any loſs to any other than the executor; and ſo it is reaſon that they ſhould have the ſuit to reverſe the outlawry, and to be reſtored to the goods; and for that, vouched 43. *Aſſiſe* 41. & 49. 34. *Hen.* 6. *pl.* 32. 15. *Edw.* 3. "*Error*," where two may have ſeveral writs of error or attaint for ſeveral loſſes; and 43. *Edw.* 3. *pl.* 32. 46. *Edw* 3. *pl.* 25. 19. *Edw.* 4. *pl.* 5. & 6. where executors ſhall have a *ſcire facias* for the damages recovered, and the heir for the land. And he ſhewed two precedents, *Mich. Term*, 11. *Hen.* 8. *Roll* 13. where one *Sudely* was indicted for robbery and outlawed, the executor brought a writ of error; and one error was aſſigned, that no proclamation was awarded; and a ſecond error, for that there was not five months between the date of the *exigent* and the return of it; and there a *ſcire facias* was awarded againſt the lords of the fee, and it was returned there were no ter-tenants; and the outlawry was reverſed. The other precedent was *Trinity*, 18. *Hen.* 7. *Roll* 3. where one was indicted of murder and outlawed; and the adminiſtrator brought error; and the error aſſigned was, Becauſe the indictment was *contra pacem domini regis*, whereas the offence was in the time of *Richard* the third—COKE argued *è contra*: for that the outlawry trencheth in the realty, and the lands and goods are forfeited, and the blood is corrupted, and therefore the executor ſhall not have error, *quia de minimis non curat lex*: and for that reaſon, at the common law, tenant for years ſhall not falſify a recovery which binds

MARSHE'S CASE.

the land in the realty, 39. *Hen.* 6. "*Falſifie Recovery*," 19. So at the common law, a traverſe ſhall not be of an office which finds a wardſhip, &c. for the king (for they were but chattels) until the ſtatutes of 28. *Edw.* 1. ſt. 3. c. 18. & 2. *Edw.* 6. c. 8. And for the precedents cited, he ſaid the errors were ſuch as were apparent faults which were reverſible by motion; and although the books of 19. *Hen.* 6. *pl.* 2. & 2. *Rich.* 3. *pl.* 21. are, that an outlawry erroneous in this court is not reverſible by plea, but by writ of error, yet he ſaid the law is otherwiſe.—But THE JUSTICES held, that an outlawry here cannot be reverſed by plea, but ought to be by writ of error; and the clerks ſaid, ſo was the courſe always. But for the matter they would adviſe.

Co. Lit. 256. b.

NOTA. 5. *Coke f.* 111. this caſe is cited to be reſolved that the writ of error was well brought by the executor, and that it was reverſed at his ſuit. *V. Paſch.* 39. *Placito* 14. *fol.* 558.

CASE 3.

Pett *againſt* Baſeden.

Eaſter Term, 33. *Eliz. Roll* 398.

A legacy "*pro* "*et in exonera-*"*tione*" of dower, is conditional; and if the legatee ſue for the legacy in the ſpiritual court, and the executor plead that he offered to pay it on receiving a diſcharge, and the court refuſe the plea, a prohibition ſhall go.

PROHIBITION. The plaintiff declared, That whereas *M. Pett* was ſeiſed in fee of divers lands, and being ſo ſeiſed made his will, and made the plaintiff his executor, and deviſed part of his land to his eldeſt ſon in fee, and that he ſhould have it when he came to his age of twenty-one years; and that in the mean time the executors ſhould take the profits for payment of debts and legacies; and deviſed 100l. to *Roſe* his wife *pro et in exoneratione* of her dower in the ſaid land, to be paid by his executor within one year after his death; and that he died, and the defendant married *Roſe*. And further alledged, that the defendant, in conſideration that the plaintiff promiſed to pay him the 100l. within one year after the death of the teſtator, did agree and promiſe to the plaintiff to make him a reaſonable diſcharge of the 100l. and alſo to the plaintiff and the ſon a reaſonable diſcharge of the dower of *Roſe*: and alledged *in facto*, that he offered the payment of the 100l. to the defendant, and required a diſcharge of the ſaid 100l. and of the dower; yet he intending to have the ſaid 100l. and after to recover the dower of the land, ſued for this legacy in the court chriſtian; and although he offered there the 100l. ſo as the defendant would make a diſcharge of dower, yet they refuſed to accept this offer, and thereupon he ſued a prohibition. And upon this declaration it was demurred in law.

FIRST, Becauſe this legacy is properly ſuable and recoverable in court chriſtian.

SECONDLY, This agreement is no cauſe to draw it out of the ſpiritual court.

THIRDLY, He had not ſhewed performance of the agreement; for he ſaith he offered it, but ſaith not that he paid it, nor that the defendant refuſed it.

FOURTHLY, He ſheweth not the time he offered it.

But THE COURT upon motion were of opinion, that the prohibition did lie: for here the words, "*pro et in exoneratione*" make a *condition*, that he ſhall not have the hundred pounds until he make a diſcharge of dower, &c. Then when he alledged, that he would have paid it, if the other would have diſcharged, &c. it is good enough, and the agreement between them is a cauſe of an action upon the caſe at common law; and this plea being miniſtered in the ſpiritual court, and they refuſed, is a good cauſe of prohibition.

Co. Lit. 204. a. Co. 10. 42. a.

Wyngate *againſt* Marke.

Case 4.

IT was held upon evidence, that if the leſſee for years of the queen be ouſted by a ſtranger, yet although he be out of poſſeſſion, he may aſſign over his term; for the reverſion being in the queen, he cannot be out of poſſeſſion but at his pleaſure. ouſted of his poſſeſſion by a ſtranger. Ante, 15. 1. Sid. 399. Owen, 216. 1. Com. Dig. 402.

A leſſee for years of the crown may aſſign his term, though he is

And it was held, that where an action was brought by an *alien* as adminiſtrator of *J. S.* who was *Engliſh*, the parties being at iſſue, the trial being *per medietatem linguæ*, that it was not well tried, and the judgment was ſtayed; for when the plaintiff brings an action not in his own right but as adminiſtrator, the trial ſhall be by *Engliſh* only: and ſo was it held, 23. *Eliz.* in *Dr. Julio's Caſe*. But if it had been averred that the inteſtate had been an *alien*, it would be otherwiſe.

Where an alien ſues as adminiſtrator to an Engliſh inteſtate, the trial ſhall be by an Engliſh jury only.

Argenton *againſt* Weſtover and Lucas.

Case 5.

Eaſter Term, 33. *Eliz. Roll* 1680.

ERROR to reverſe a fine.—First Error. It appeareth by the record, that the caption of the conuſance of the fine was before Sir Roger Manwood, *Chief Baron*, 27th *March* 27. *Eliz.* and the writ of covenant and *dedimus poteſtatem* bore *teſte* 9th *April*, ſo the conuſance taken without warrant; and by the 23. *Eliz.* c. 3. the day of the caption is always to be certified. But the Court over-ruled it, and would not hear it argued; for they ſaid it is good enough, and otherwiſe they ſhould reverſe divers fines.—Second Error. The writ of covenant was, *de manerio de Corthuther*, and the *dedimus poteſtatem* was, *de manerio de Cortheder*; and for this variance there is no conuſance upon the writ. But it being with an *alias Corthuther*, it was held good.—Afterwards in *Eaſter Term*, 35. *Eliz.* it was moved again, and other errors aſſigned.—First, That by the caption of the fine upon the *dedimus poteſtatem*, the land was given to *Weſtover* and his wife, and to the heirs of the body of the *baron* of the body of the *feme* begotten; and the fine engroſſed was, to the heirs of the body of the *baron* upon the wife begotten; ſo is variant. But all the Juſtices conceived, that it was not material; for in both caſes the *feme* had but an eſtate for life, and the *baron* an eſtate tail, and the words are of the ſame ſenſe.—Secondly, Popham, *Chief Juſtice*, took an exception, that the writ of covenant and the caption was, *de manerio & tenement.* and five ſhillings rent, and the fine engroſſed was, *de manerio & tenementis*. But it was ſaid and agreed, that the courſe of fines is, that if the rent be under five pounds, that they uſe not to mention it in the fine engroſſed.—Third Error aſſigned was, For that the caption was, *ſi contingat* the *baron* to die without iſſue, that it ſhould remain over; and the fine engroſſed was, *ſi contingat* that the *baron* and *feme* die without iſſue, that it ſhall remain over; ſo it is variant. But it was held all one, for the eſtate in remainder is always limited upon the more long eſtate which is the eſtate tail, yet it was all of one ſenſe.—And afterwards the fine was affirmed.

Error to reverſe a fine for variance. Poſt. 677. 740. 3. Com. Dig. 347, 348. 1. Wood's Con. 550. Cruiſe on Fines 83.

CASE 6.

If a declaration in *aſſumpſit* for coſts of ſuit, omit to ſtate what coſts were expended, it is erroneous on *demurrer*, but good *after verdict*.
Yelv. 110.
1. Sid. 413.
2. Saund. 373.
Cro. Car. 573.
Raym. 8.
3. Bulſt. 31.
Strange, 127.

Foxe *againſt* Goodſon.

ASSUMPSIT. That whereas the plaintiff had ſued ſuch an action againſt the defendant, and being at iſſue had ſued out a *niſi prius* upon it; the defendant, in conſideration the plaintiff would ſurceaſe his ſuit, promiſed to aſſign ſuch a leaſe to him, and to pay his coſts of ſuit: and alledges he had ſurceaſed, and the defendant had not aſſigned the leaſe, nor paid his coſts of ſuit. And upon *non aſſumpſit* pleaded, it was found for the plaintiff. It was alledged in arreſt of judgment, that the declaration was not good, becauſe he did not alledge what coſts he had expended.—And ALL THE JUSTICES were of opinion it was not good for that cauſe, and the defendant might have demurred upon it; but he not demurring, but taking iſſue, he ſhall not now have advantage of it. And thereupon it was adjudged for the plaintiff.

CASE 7.

The jury are not compellable to find a priſoner guilty of manſlaughter on an appeal of murder.
Poſt. 296. 465.

4. Co. 43. 47.
1. Sid. 325.
1. Hale, 449.

Wroth *againſt* Wiggs.

APPEAL of murder. The defendant pleaded not guilty, and being arraigned by a ſubſtantial jury of *Middleſex*, the evidence was pregnant that he was guilty of man-ſlaughter, but for the murder was doubtful. The jury found he was not guilty of murder; and being demanded if he was guilty of man-ſlaughter, they anſwered they had nothing to do to enquire of it.—Upon this THE COURT, being in doubt, ſent FENNER, *Juſtice*, to the common pleas to know their opinion; who conceived, that by the law the jury are not compellable to inquire of the man-ſlaughter.

Thereupon they gave their verdict as before; and the priſoner was diſcharged. 9. *Eliz. Dyer*, 261. a. (*a*).

(*a*) But the jury may find the defendant guilty of manſlaughter. See Old Bend. 172. 2. Roll. Rep. 460. *L. C. B.* PARKER's *MSS.*

CASE 8.

By the common law no tithes are payable for a dwelling-houſe.

Sed vide S. C. Moor, 912.
3. C. Dig. 108.

Green *againſt* Piper.

IT was held by THE JUSTICES, that a houſe in *London* which was part of the poſſeſſions of a priory that was diſcharged of paying tithes of their poſſeſſions, yet by the 37. *Hen.* 8. c. 2. ſhall be charged for tithes according to the ordinance there; for before that ſtatute no dwelling-houſe was chargeable for tithes, becauſe no profit ariſeth of it, and only noblemen's houſes are excepted. And it was adjudged accordingly, and a conſultation was granted. 2. Roll. Abr. 636. Hob. 11. 11. Co. 16. a.

CASE 9.

A *modus* to find ſtraw for the body of the church in lieu of the tithes of hay is not good.
Ante, 71.

2. Bro. Ch. Caſ. 161.
Dougl. 204.

Scory *againſt* Baber.

PROHIBITION againſt the proprietor of the church of *Southkirby* in the county of *York*, who ſued for tithes of hay; and ſurmiſed, that time out of mind the owners of theſe lands had found ſtraw for the body of the church in diſcharge of all tithes of hay. COKE moved, that this is no cauſe of diſcharge, for the parſon was not chargeable with it, nor had any benefit by it; and in *Hilary Term*, 30. *Eliz.* it was ruled, that where one preſcribed that he had uſed to pay the pariſh-clerk his wages in ſatisfaction of tithe-hay, this was no

no diſcharge.—And of that opinion was THE WHOLE COURT. But if he had alledged that he gave the ſtraw to the parſon, and he beſtowed it in the body of the church, or that the parſon had a ſeat in the body of the church, it had been otherwiſe: and thereupon conſultation was granted.

SCORY *againſt* BABER.

Eaſter Term,

34. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir William Periam, *Knt.*
Thomas Walmſley, *Eſq.* } *Juſtices.*
Francis Beaumond, *Eſq.*
Sir John Popham, *Knt. Attorney General.*
Sir Thomas Egerton, *Knt. Solicitor General.*

Lyſs *againſt* Watts.

CASE 1.

PROHIBITION upon a libel for tithes of ſlate ſtones. The defendant prayed a conſultation, for that heretofore the plaintiff ſued a prohibition for the ſame cauſe in chancery, and upon the ſame libel, and there a conſultation was granted; for otherwiſe he ſhall be infinitely vexed, that when one court grants a conſultation, he ſhall ſue a prohibition in another court.—And of this opinion was all THE COURT, that he ſhall have a conſultation, if before a conſultation was granted in another court upon the ſame cauſe. And it was here held by THE JUSTICES, that no tithes are due of a quarry of ſlate or ſtone, for the parſon may have tithes of the graſs or corn which groweth upon the ſurface of the land in which the quarry is.

No tithes due for a quarry of ſtone; and if one court grant a *conſultation*, it is a ground to refuſe a *prohibition* in another. Poſt. 736.
2. Inſt. 651. 1. Roll. 637. 4. Co. Dig. 518. Dougl. 620.

Tropp *againſt* Bedingfield.

CASE 2.

DEBT upon an obligation. The condition was, that if *J. S.* perform the arbitrament of *J. N.* if any be made before the feaſt of *Eaſter*; and if none be made, if the ſaid *J. S.* came to the Guildhall in *Norwich* at the feaſt of *Penteceſt*, and there ſuffers himſelf to be arreſted at ſuch a ſuit, and doth not remove himſelf, if ſuch ſuit be commenced, but ſhall anſwer to the action without delay, *or* pay to the plaintiff at the feaſt of *Michaelmas* ten pounds; that then, &c. The defendant pleads, that no arbitrament was made before the feaſt of *Eaſter*, that *J. S.* died before *Penteceſt*, and anſwered nothing to the reſidue of the condition. The queſtion was, If it were a good plea?—And THE JUSTICES upon the firſt

Quære, Whether a condition in the alternative is broken, if one part becomes impoſſible by the act of God? Ante, 10. Poſt. 399. 5. Co. 22. Moor, 357. Poph. 98. Dougl. 690.

1. Roll. Ab. 450. Jones, 171, 181. 2. Mod. 202. 3. Mod. 232.

TROPP *againſt* BEDDING-FIELD.

motion conceived it was, becauſe that by the act of God he is deprived of his appearance; and ſo his bond is ſaved, although he pay not the ten pounds, for he had election to do the one or the other: but they would adviſe.

CASE 3.

Maſon *againſt* Nevill.

Special pleading.

TRESPASS. The defendant pleads, that *Alex. Nevill* his anceſtor was ſeiſed, and died ſeiſed, and the land deſcended to him as ſon and heir, &c. The plaintiff replied, that long time before *A. Nevill* had any thing in the land, *J. S.* was ſeiſed in fee, and inſeoffed four others to the uſe of himſelf and his wife for their lives, and after to the uſe of *W.* his ſon for life, and after his deceaſe that they ſhall be ſeiſed *ut in eorum priſtino ſtatu*, upon condition that they ſhall receive the profits, and pay to *B.* the wife of *W.* twenty pounds *per annum* during her life, and after they ſhall be ſeiſed to the uſe of the heirs males of the body of *W.*: that the *baron* and *feme* died; that *W.* entered and inſeoffed the ſaid *Alex. Nevill* and died, who entered, and deviſed it by his will in writing to his younger ſon for life: and afterwards *A.* the wife of *W.* died, and *Nich.* as ſon and heir of the body of *W.* entered, and let to the plaintiff.

Upon this it was demurred in law.—Firſt, Becauſe he did not traverſe the deſcent.—Second, Becauſe, as this caſe is, the heir male of *W.* cannot enter; for by the feoffment the eſtate tail is diſcontinued, and none can enter except the feoffees enter and revive the uſe.

But after motion of the caſe by the ſerjeants, without any great argument, THE COURT gave judgment for the plaintiff; for the deſcent is not traverſable, but the dying ſeiſed, which is confeſſed and avoided by the deviſe.—And PERIAM ſaid, the deſcent in any caſe is not traverſable, but where both parties claim by the ſame perſon; and that this feoffment was no diſcontinuance, nor barred the entry of the heirs.—*Quære* the reaſon, for the Court did not ſhew any reaſon of their judgment. 14. *Hen.* 8. *pl.* 23. 19. *Hen.* 8. *pl.* 6. 21. *Eliz. Dyer*, 366.

Ante, 30. 2. Cr. 221.

CASE 4.

Eyre *againſt* Woodfine.

Eaſter Term, 33. *Eliz. Roll* 818.

If a termor for years be outlawed, he ſhall be reſtored to the term on reverſal of the outlawry, tho' it has been ſold by the king. Ante, 270. Moor, 270. 237. 573. 5. Co. 90. b. 8. Co. 143. a. 3. And. 77. 188. 2. Ver. 315.

EJECTIONE FIRMÆ. The caſe upon ſpecial verdict was, A termor for years being outlawed upon the ſtatute of recuſancy, by which his term was forfeited to the queen, the lord treaſurer and barons of the exchequer ſold it for ten pounds to *Fr. Michel*; and afterwards the outlawry was reverſed. The queſtion was, If the termor ſhall have again his term?—And after argument by GLANVILE of the one part, and BEAUMONT of the other part, ANDERSON and WALMSLEY, *Juſtices*, conceived the termor ſhall have again his term, and not the money for which it was ſold; and in whoſeſoever hands the lands came, and by whatſoever conſideration, the party ſhall be reſtored; for the outlawry being reverſed, it is as if there were no record, and the queen's intereſt

2. Jones, 101. 2. Lev. 49. 2. Hawk. 656. 2. Bac. Abr. 232. 370. 2. Crom. Prac. 61.

was

was but conditional, *viz.* it is good if the outlawry be good; and therefore the term being ſold, it is tied with the condition into whomſoever hands it cometh, that if the outlawry be reverſed, the term is reduced to the owner. And it is not like a ſale made by the ſheriff, for the ſheriff ſells it by authority of law to levy the money; and there if the judgment be reverſed, the party ſhall be reſtored only to the money and not to the term; for he loſt it not by the judgment.—But PERIAM doubted, and ſaid, that although by the YEAR BOOK of 11. *Hen.* 4. *pl.* 65. that upon the reverſal of the outlawry the party ſhall have reſtitution, yet the Book ſpeaks not if it be ſold before. And here it is miſchievous of both ſides, if the party that bought it lawfully ſhall loſe it; and of the other ſide, if the other ſhall not be reſtored to it, he ſhall have nothing; for it will be hard to be reſtored to the money out of the queen's coffers.—But afterwards, *Trin.* 34. *Eliz.* ANDERSON and WALMSLEY gave judgment for the plaintiff, PERIAM not being reſolved in it. *Vide* 20. *Eliz. Dyer.* 363.

EYRE *againſt* WOODFINE.

Loftus' Caſe.

CASE

NOTA. PUCKERING demanded the opinion of THE JUSTICES in this caſe. *Loftus* being poſſeſſed of a term for eighteen years, and of another term in the ſame land in reverſion for forty years, died inteſtate; his wife takes adminiſtration and enters, and marrieth *J. S.* who let it to *J. D.* for twenty-one years, rendering rent, and makes his executor and dieth. The queſtion was, If his wife or executor ſhall have the rent?—PERIAM. During the firſt term for years the executor ſhall have it; for the *baron* had given away all that term, and no intereſt remained in the *feme*, and the rent by the indenture ſhall go to the executor; but for the reſidue of the term of twenty-one years, which is derived out of the leaſe for forty, the wife ſhall have it, as annexed to the reverſion or term which the wife had.—*Quære*, for the other Juſtices delivered no opinion.

If a huſband makes a leaſe of part of his wife's term, and dies, the wife and not the executor ſhall have the rent. Ante, 33.

Sed *quære.* Vide Poph. 5. 97. 145. Co. Lit. 46. b. 151. a. 300. a. Cro. Car. 344. Plowd. 418. 8. Co. 97.

Roll. Ab. 841. Godb. 279. 3. Keb. 299. Vent. 259. 3. Wilſ. 278. 2. Bl. Rep. 801. Cowp. 201. Dougl. 53.

Bayly *againſt* Churington.

CASE 6.

ACTION for theſe words: "Thou art a falſe knave: thou waſt "arraigned for two bullocks."—Adjudged that the words were not actionable; for he ſaith not he was arraigned for ſtealing two bullocks: and if the words had been ſo, yet the words had not been actionable; for a man may be arraigned for felony, and yet be no felon.

Words not actionable. Cro. Jac. 268. 2. Wilſ. 300. B. R. H. 339.

Charnel's Caſe.

CASE 7.

ACTION for words againſt huſband and wife, becauſe the wife ſaid, "My turkies are ſtolen, and *Charnel* hath ſtolen them." It was moved that an action lay not; for it appears that the *feme* could have no turkies, for they are the *baron's*, and ſo could not be true; and then no diſcredit.

Words importing theft from a *feme covert* are actionable, tho' ſhe can have no goods.

Cro. Jac. 200. 1. Roll. Abr. 74. 4. Bac. Abr. 509.

CHARNEL'S CASE.

CURIA *contra*. Because she had charged him with stealing; and if one which had no horse saith, "*J. S.* hath stolen my horse," this is as great discredit as if he had had one, for every one knoweth not whether he had a horse or not.

CASE 8.

Blitheman *against* Blitheman.

A covenant by tenant in tail that the land shall *remain and be* to his son after his death is void, but his wife shall be endowed.
Post. 345. 471. 895.
Co. 2. 52. a. 72. 1. And. 291. Moor, 683. 940. Yelv. 51. 1. Roll. Ab. 677. Sh. Touch. 509. Gilb. Uses, 60. 115. 2. Ld. Raym. 781.

DOWER. The defendant pleads, *ne unques seise per dower*, &c. and upon this they were at issue. The jury found a special verdict, that *J. Blitheman*, the husband of the demandant, and father of the tenant, was seised of the land in tail, and in consideration of a marriage of the tenant his eldest son, covenanted by indenture, that this land after his death shall descend, remain, or shall be to the son and his heirs; and afterwards he taketh the demandant to wife and dieth. And, If he was seised of such an estate of which she was dowable? was the question.—And THE COURT resolved for the demandant: for by the indenture no estate was altered in the *baron*, but he remaineth tenant in tail as before; and this for two causes.

First, Because it is only a covenant and executory, for which an action of covenant lieth if he perform it not; for it is not that he will stand seised to the use of himself for life, and after to the use of the son, but only to that it shall descend, remain, or be to the son after his death; which may be by his permission that it shall descend and be to the son, without any alteration of the estate.

2. Levinz, 84.

Post. 471.

Second, If it were an express covenant that he would stand seised to the use of himself for life, and after to his son, this had been void to alter the use to the son; for he being tenant in tail, and reserving to himself an estate for his own life, in that he reserved all that he might lawfully dispose; and then by the covenant he can dispose of no more than he can lawfully do; and so the limitation after his death is merely void, and the estate remained in him as before (*a*). For both which causes, but principally for the first, they held the demandant should have judgment; and it was given accordingly. *Vide* 2. *Co. f.* 52.

(*a*) It is now settled that a release or a bargain and sale by a tenant in tail is not absolutely void, but gives a base fee, voidable by the issue in tail. Salk. 619. 7. Mod. 18. 11. Mod. 19. 3. Burr. 1705. Comyns, 120.

NOTE, On the last day of *Easter Term*, 34. *Eliz.* died *Sir Christopher Wray*, *Knt.* chief justice of her Majesty's court of queen's bench; a most reverend judge, of profound and judicial knowledge, accompanied with a very ready and singular capacity, and admirable patience. He was succeeded by SIR JOHN POPHAM, *Attorney General*. 3. Co. 26. 6. Co. 75. Cro. Jac. 166.

Trinity

34. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* *Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Thomas Egerton, *Attorney General.*
Sir Edward Coke, *Solicitor General.*

Fox *againſt* Lee.

CASE 1.

Trinity Term, 33. Eliz. Roll 555.

To bond for the payment of money on ſeveral days certain, plea of payment *ſecundum formam et effectum conditionis prædictæ* is good.

ERROR of a judgment in *Ludlow*, in debt upon an obligation. The condition was for payment of ſeventy pounds, *ſcil.* 35 l. at one day in the *Temple* church, *London*; and 35 l. at another day. The defendant pleads payment of the ſeventy pounds at *Ludlow ſecundum formam et effectum conditionis prædictæ*; and iſſue taken upon it, and found againſt him, and judgment given for the plaintiff. And two errors were aſſigned.

1. Lut. 549. 571.
2. Bulſt. 267.
1. Lev. 145.

FIRST, That he alledged payment of the ſeventy pounds according to the condition, where he ought to plead ſeveral payments, of thirty-five pounds at one day, and of the other thirty-five pounds at the other day, and not to couple them together.—But THE COURT held it good enough; for when he pleads payment *ſecundum formam et effectum conditionis prædictæ*, this *reddendo ſingula ſingulis* is as if he had pleaded he had paid them ſeverally at the ſeveral days.

When the jurors names ſhall be recorded.

SECOND ERROR. For that the names of the jurors did not appear of record.—But it was held good enough, for that never appeareth where the jury is full of the principal pannel; but where the inqueſt is part of the principal pannel, and part by *tales de circumſtantibus*, there the names of both ſhall be entered upon record.—And the judgment was affirmed.

Yates *againſt* Windham.

CASE 2.

Vide Ante, Page 64. and 155.

Error *coram vobis* may be brought after the firſt writ diſcontinued and errors aſſigned, and the plaintiff may aſſign the ſame or other errors, either within or without the record; but it muſt be entered on the ſame roll with the firſt writ.

IT was moved this term.—COKE ſhewed that upon the ſecond writ, *quòd coram vobis reſidet*, the plaintiff aſſigned new errors, *ſcil.* a diſcontinuance; and that the judgment was, that the defendant *ſit in miſericordiâ*; whereas it appeareth, that the defendant did appear upon the ſummons. To which the defendant in the writ of error appeared and pleaded, that heretofore the plaintiff brought a writ of error upon this judgment, and ſhewed all the proceeding in it; and that this is diſcontinued, in which none of theſe errors were aſſigned: and upon this the plaintiff demurred in law.—COKE argued, that this writ of error, and the errors aſſigned upon it, cannot be maintained.—Firſt, The plaintiff cannot alledge diminution to reverſe a record, after errors aſſigned, and *ſcire facias* ſued upon it; nor can the defendant alledge it after *in nullo eſt erratum* pleaded, for by it the record is affirmed; and ſo

YATES *againſt* WINDHAM.

Carth. 370. Co. Ent. 269. 1. Stra. 609. Ld. Ray. 151. 1403.

28. *Hen.* 6. 7. *Edw.* 4. & 22. *Edw.* 4.—Secondly, In a writ of error *coram vobis reſidet*, the plaintiff ſhall not aſſign errors but in the record removed, and not in the judicial proceſs; for the words of the writ are, that there is error *in recordo quòd coram vobis reſidet*; ſo it is admitted, that this is all the record.—Thirdly, Upon a writ of error, *quòd coram vobis reſidet*, the entry is *allegando errores prædict' in formâ prædict' allegat.* and ſo is the precedent *Trin.* 20. *Hen.* 7. 88. But if theſe errors be over-ruled, he may aſſign other errors within the record: but here is no mention of the former errors. Alſo this is entered in another roll, and not upon the ſame roll, ſo that the Court might ſee all together, and ſo is the courſe; otherwiſe the Court ſhall not intend it to be the ſame cauſe, and the Court ſhall be compelled to infinite ſearch, which the law will not allow.—But THE JUSTICES ſaid, that inaſmuch as the firſt writ is diſcontinued, and this is a new writ ſued, the plaintiff is not tied to the former errors, but may aſſign other errors at his pleaſure; for it is now as if no errors were aſſigned before, and he may aſſign other errors in the record, or other errors out of the record; and this removing of the reſidue of the record in this manner is well allowable; and theſe errors may be well aſſigned: and as to theſe points they were ſatisfied; but for the entry of it upon another roll, they doubted, and would adviſe.—And afterwards for this cauſe it was held a miſentry, and the plaintiff put to a new writ of error.

CASE 3.

Beaucamp *againſt* Neggin.

Money paid for the uſe, and at the *requeſt* of another, raiſes a *continuing* conſideration.

Cowp. 289. 1. Term Rep. 21. 286. 2. Term Rep. 370.

ERROR of a judgment in *aſſumpſit*.—Firſt error. For that *Neggin* the plaintiff in the *aſſumpſit* declared, that whereas the ſaid *Beaucamp*, in conſideration that the ſaid *Neggin* had paid for him, and at his requeſt, to *C.* at ſuch a day (which was a year before the promiſe) ten pounds, he aſſumed to repay it *cùm inde requiſitus eſſet*. Which conſideration is not good, becauſe it was for a thing paſt.—Second error. The *aſſumpſit* was laid at *Worceſter in Alta Warda ibidem*, and the *venire facias* was of the city of *Worceſter*, whereas it ſhould be *de Alta Warda*; for by it, it is intended there be more wards. *Sed non allocantur*. For as to the firſt, when the payment is laid to be at his requeſt, the conſideration doth continue, and ſo is the common courſe. And as to the ſecond error, it ſhall not be intended that there be more wards, except it be alledged.

Vide ante, 42. and note (*a*) p. 260.

CASE 4.

Brown *againſt* Worſely.

Trinity Term, 33. *Eliz. Roll* 683.

Damages *ſeverally* aſſeſſed for calling another "*a whore* and a *thief*," and the judgment affirmed as to the one, and reverſed as to the other. Poſt. 329.

2. Roll. Ab. 51. 4. Co. 18. a. 10. Co. 130. b. Cro. Jac. 114. Dougl. 730.

ERROR of a judgment in the common pleas, in an action for words, *viz.* "Thou art a whore and a thief, for thou haſt "poiſoned thy huſband." Upon not guilty pleaded, the jury found againſt him, and aſſeſſed damages for the firſt words, ſix pounds ſix ſhillings and eight-pence; and for the other words, twenty marks. Theſe damages were ſeverally aſſeſſed by the advice of the *L. C. J.* ANDERSON, before whom it was tried; and thereupon ſeveral judgments were given for the damages. And upon this error was brought, for the words will not maintain an action. For the firſt words, ſuit for them is to be in the ſpiritual court, and no remedy for them at common law. And as for the ſecond words, although the word "thief" will maintain an action, yet the

the words subsequent will not maintain the former.—But *Mich.* 34. & 35. *Eliz.* the judgment was affirmed, that an action lay for the last words: but for the words "Thou art a whore," no action lay; and as to that, the judgment was reversed.

BROWN *against* WORSELY.

Pyers *against* Turner.

CASE 5.

Hilary Term, 34. *Eliz.* *Roll* 766.

ASSUMPSIT, as administrator to *Greenway*. And declares, That whereas one *Walter Turner*, the son of the defendant, was bound by obligation of eighteen pounds to the intestate; which money was not paid at the day, but the son moved the father to pay it for him; the defendant, in consideration that the intestate would give him a longer day, promised to pay it; and that the intestate gave him a longer day, *scil.* the sixth of *May*, &c. And upon *non assumpsit* pleaded, it was found for the plaintiff.—And it was now moved in arrest of judgment, First, That he did not shew the place where administration was committed, as 35. *Hen.* 6. *pl.* 31. is. *Sed non allocatur*; for it is good in a declaration, but not in a bar.—Secondly, It was moved that here is no consideration; for the giving day to the father who was not indebted, is not material, otherwise, if he had given day to the son. *Sed non allocatur*; for by GAWDY laying all the matter together, that the father required it upon the request of the son, and the other giving day, it is good; and a recovery in this action shall be a good bar in debt upon the bond against the son.—And to this THE COURT agreed, and the plaintiff had judgment.—NOTA. *Trin.* 37. *Eliz.* in the exchequer-chamber this judgment was reversed, for it was no consideration.

Assumpsit cannot be maintained against a father, on a promise to pay in consideration of forbearing to sue a bond against his son, altho' the promise be made at the son's request. Ante, 207. 240. Sed vide Cowp. 128. *contra.*

Hassall *against* Juxon.

CASE 6.

TRESPASS for breaking a house in such a parish and ward in *London*. Upon not guilty the jury found the trespass, and that the house was in the parish, but not in the ward.—And it was held that this verdict is for the plaintiff; for the finding it was not in the ward is superfluous, it being admitted by the parties; and the jury had not to meddle with it: and it was adjudged for the plaintiff (*a*).

(*a*) Aliter in ejectment. *L. C. B.* PARKER's *MSS.*

The jury need not find *the ward* in which trespass is laid. Ante, 41. Post. 333. Dyer, 147. 2. Co. 4. 1. Stra. 595. 5. Bac. Ab. 315.

Allens *against* Andrews.

CASE 7.

Hilary Term, 34. *Eliz.* *Roll* 720.

THE plaintiff had brought debt as administrator to *Geo. Warlow*, by reason of administration committed to him by the archbishop of *Canterbury* against the defendant, and had judgment to recover; and after the year brought a *scire facias* upon the judgment. The defendant pleaded, that the intestate died in *London*, and had not *bona notabilia* in divers dioceses; and that after the judgment, the bishop of *London* committed administration to the wife: and upon this it was demurred.—And ANDREWS himself moved, that he might well plead this plea; for it was a matter of *puisne temps*, and he could not plead it before.—But all THE JUSTICES held he came too late. For POPHAM said, if the administration had been repealed, he might well avoid the judgment

To a *scire facias* on a judgment, the defendant cannot plead any matter which might have been pleaded to the action. Post. 315. 457. 575. 1. Sid. 182. 1. Salk. 2. 39. 600. Ld. Ray. 853. 12. Mod. 499. B. R. H. 233. Cowp. 728.

ALLENS *againſt* ANDREWS.

ment by this plea, for it was of *puiſne temps*. But this was a matter he might have pleaded before, and it is in adnulling of the record, which is not ſufferable; and the plaintiff had judgment.

CASE 8.

Boyer *againſt* Jennings.

Eaſter Term, 33. *Eliz. Roll* 248. *or* 348.

A bad replication cannot be aſſigned for error after judgment by *nihil dicit*. *Ante*, 62.

8. Co. 133. b. 1. Term Rep. 40.

ERROR of a judgment in debt in the common pleas, where the defendant pleaded a good bar, and the plaintiff made an ill replication: and the defendant did not rejoin, but judgment was given againſt him upon a *nihil dicit*; and now he would aſſign error, for that the replication was ill; ſo that it appeared upon his own ſhewing, that he had no cauſe of action, and then no judgment was to be given for him.—But THE COURT held he could not aſſign error in it; for judgment being given by *nihil dicit*, it is all one as if no bar or replication had been made; for the Court, without iſſue or demurrer, ſhall not adjudge upon the replication: and although it was entered, yet when the defendant doth not rejoin, this is a waiver of all; and if it were in this court, it is never entered until the rejoinder be made. Wherefore the judgment was affirmed. 3. *Hen.* 6. *pl.* 41. 38. *Hen.* 6. *pl.* 39. 12. *Edw.* 3. "*Eſſoign*" 17.

CASE 1.

Flower *againſt* Rigden.

Trinity Term, 34. *Eliz.*—*In the Common Pleas.*

If the feoffee of a diſſeiſor lets the land pending an aſſiſe againſt the diſſeiſor *only*, the termor may falſify the recovery. Poſt. 718.

27. Hen. 8. pl. 7. 21. Hen. 7. pl. 25. 9. Co. 135. Co. Lit. 46. a.

REPLEVIN. The caſe was, A diſſeiſor infeoffed a ſtranger, and after the diſſeiſee brought an aſſiſe againſt the diſſeiſor only; and the feoffee pending the aſſiſe let the land to the plaintiff. The diſſeiſor pleads to the aſſiſe *nul tort*, *nul diſſeiſin*, &c. and found againſt him; whereupon the diſſeiſee recovered. The queſtion was, If the termor for years ſhall falſify his recovery? that is to ſay, that the defendant in the aſſiſe *ne diſſeiſe pas?*—And it was agreed by THE COURT, that he might: for the termor here did not claim by him againſt whom the recovery was had; and there is no doubt that the freehold, out of which the term is derived, is not recovered, and the freehold is not bound by it. And the doubt at common law (*a*) was, if the termor might falſify where the recovery was againſt the leſſor; but it was never doubted, but that where a recovery is not againſt the reverſioner, but againſt a ſtranger which had nothing in the land, but that the leſſee might falſify in point tried; and ſo is 1. *Hen.* 7. *pl.* 19. And it is a rule, that every ſtranger to a recovery may falſify (for he cannot have error or attaint), if he came not in pending the writ, by him againſt whom the recovery was, for then he is bound.—And afterwards it was ſo adjudged, that he might falſify in the point tried,

(*a*) See 21. Hen. 8. c. 15.

CASE 2.

Farrar *againſt* Johnſon.

A fine levied of a ſeignory or reverſion to a uſe, is executed by 27. *Hen.* 8. c. 10. Dougl. 774.

THE caſe was, A *feme* leſſee for life, the reverſion to two coparceners, the *feme* and one of the coparceners make a leaſe for years of the whole, rendering ten pounds rent *per annum* to the *feme* during her life, and after ten pounds to the ſaid coparcener. Afterwards the *feme* and the two coparceners join in a fine, *ſur conuſans de droit come ceo*, &c. to two ſtrangers, to the uſe of *Farrar*, the

the husband of the coparcener that joined in the lease. Two questions were moved.—First, If he in the reversion levy a fine to the use of himself, if attornment be needful? And resolved it was not; for he is in by the 27. *Hen.* 8. c. 10. So in every case of a fine levied of a seigniory, or of a reversion to an use.—Second, If by this joining in the fine by tenant for life with the reversion, if the estate for life be surrendered, and the rent extinct, because the reversion to which the rent was incident is gone? THE COURT doubted, but inclined it was not; for every one granted what in him lay.—PERIAM said, if they had not levied a fine, and tenant for life died, the lease was good but for a moiety of the parcener that let, yet the rent remained for all.

FARRAR *against* JOHNSON.

Co. Lit. 309. b. 6. Rep. 6 b. Cro. Jac. 195.

Edwards' Case.

CASE 1.

Trinity Term, 34. Eliz. In the Exchequer Chamber.

ACTION upon the case. For that the plaintiff having a cellar, in which he put divers hogsheads of wine, and the defendant having a warehouse over the cellar, maliciously laid into the warehouse such a weight of wares, *quòd propter gravitatem ponderis* the floor of the warehouse fell down and spoiled all his wines, by which, &c. The defendant pleaded, that *J. S.* was possessed of the warehouse, and of the cellar; and let the cellar to the plaintiff, and the warehouse to the defendant; and that at the time of the lease made, the warehouse was much in decay and ruinous; and that there used to be laid in the warehouse a thousand weight, and that he put in it but eight hundred weight, *et propter ruinositatem* it fell down; and concluded his plea, *et hoc paratus est verificare.* Upon this it was demurred in law. And the principal cause of the demurrer was, for that the plaintiff laid to the defendant's charge, that he *malitiosè* did overcharge the warehouse with wares, and that it fell *propter gravitatem ponderis*; and the defendant answered, that it was ruinous, and fell *propter ruinositatem*, and did not traverse that which was laid to his charge.—And this case was argued by ATKINSON and FLEMING *for the plaintiff*, and by COKE and DALTON *for the defendant*.—And after several arguments at the bar, GENT and CLARK, *Barons*, held strongly, that the plea was not good for want of a traverse; for when a *malfeasance* is laid to the defendant's charge, he ought expressly to traverse it, and not to answer it by argument.—But MANWOOD, *Chief Baron*, held strongly the contrary, that the plea was good; for he confessed that it fell, but shewed *how*: as in waste, the defendant pleads that it was ruinous at the time, without answering expressly to the waste. So in an action upon the case against an inn-keeper, it is a good plea, that the plaintiff was robbed by one who came in company with him, without traversing that it was by his default.—But it was answered, that no *malfeasance* is expressly supposed by these acts, but only a permission. But here an ill act is expressly supposed, which ought expressly to be traversed. And the two *Barons* said, that so was the opinion of the other Judges, with whom they had conferred: wherefore, against the opinion of MANWOOD, they gave judgment for the plaintiff.

In an action on the case, that the defendant overcharged a warehouse by means whereof it fell, if he pleads that it was ruinous and therefore it fell, he must traverse that it was overcharged.

See Calye's Case, 8. Co. 33. a. and Fitz. *tit.* Hostler, 1, 2.

Highgate

Case 2.

Highgate *againſt* Diggs.

Trinity Term, 34. Eliz.

An imperfection in a bill is not helped by a verdict. Ante, 119. Sed vide Hob. 264. Jones, 304. *contra.* 1. Co. Dig. 319.

ERROR aſſigned was, That *Diggs* had brought a writ of covenant, and declared upon an indenture; but in the bill upon the file, there was no date of the indenture, but ſpaces left for it; but the declaration was perfect and compleat: and for that the bill upon the file is as an original writ, which is the warrant for the declaration, and this not being perfect, the declaration cannot aid it.—For this cauſe the judgment was reverſed. And they ſaid, if there be no bill upon the file, this is a plain cauſe of reverſal, and that they had ſo adjudged it. And ſo it is here as if there were no bill. Wherefore, &c.

See 18. Eliz. c. 14. 21. Jac. 1. c. 13. 16. & 17. Car. 2. c. 8. 4. & 5. Ann. c. 16. 5. Geo. 1. c. 13.

Case 3.

Rawſon *againſt* Maynard.

Ejectment upon a demiſe of the fourth part of a houſe is good, tho' it ſay he entered *tenementa prædict'*. Ante, 234. Running's Eject. 97. 1. Term Rep. 21.

ERROR of a judgment in the queen's bench. The error aſſigned was, That in an *ejectione firmæ* the plaintiff did count of a leaſe of one-fourth part of a houſe in *N.* in four parts to be divided; by force of which he entered *in tenementa prædict'*, and was *inde poſſeſſionatus*, until the defendant did eject him *de tenementis prædict'*; whereas he ought to ſuppoſe his entry into the fourth part, and the ejectment of the fourth part.—*Sed non allocatur*: for THE JUSTICES ſaid, that the entry and ejectment ſuppoſed *de tenementis prædict'* ſhall not be intended of the entire tenement, but of the fourth part of the houſe, according to his declaration: and the judgment was affirmed.

Case 1.

Jernengham and Cornwallis.

Trinity Term, 34. Eliz.—In the Court of Wards.

A deviſe of three manors *in capite*, two in fee, and a third in tail, is good for thoſe in fee. See 32. Car. 2. c. 24. Powel on Dev. 216.

THE caſe was, A man was ſeiſed of three manors, of two in fee, and of the third in tail, all being held *in capite*; and he deviſed all of them to a ſtranger. The queſtion was, For how much this deviſe was good?—This was referred to the two *Chief Juſtices*; and they conceived it was good for the whole two manors which he held in fee, and void for the third; for he being tenant in tail of the third manor, and that deſcending to his iſſue, is a ſufficient performance of the ſtatute of 32. *Hen.* 8. c. 7. and the intent of it is ſatisfied.

Michaelmas Term,

34. & 35. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Thomas Gawdy, *Knt.*
Edward Fenner, *Eſq.* } *Juſtices.*
John Clench, *Eſq.*
Sir Thomas Egerton, *Knt. Attorney General.*
Sir Edward Coke, *Knt. Solicitor General.*

Beal *againſt* Charter.

CASE 1.

TRESPASS for falſe impriſonment. The defendant juſtified as conſtable of *A.* becauſe the plaintiff brought a child of the age of two months, and laid it in the church-yard of *A.* to the intent to have deſtroyed it, or to charge the pariſh with the keeping of it; for which he did arreſt him, and put him in the ſtocks; for which, &c.—And upon this, it being demurred, it was held a good juſtification, for it is an ill practice, and is good cauſe to ſtay the plaintiff, and to impriſon him. And afterwards in the ſame term it was adjudged, that the plaintiff *nihil capiat per billam.*

The dereliction of a child is an offence for which a conſtable may juſtify impriſoning the offender in the ſtocks. Ante, 204. Poph. 12. Moor, 284. Owen, 98. 1. Leon. 327.

Grute *againſt* Locroft.

CASE 2.

Eaſter Term, 33. Eliz. Roll 211.

TRESPASS. Upon demurrer the caſe was, *Baron* and *feme* jointenants during the coverture for ſixty years; the *baron* by indenture let all the land for ſeventy years, to commence immediately after his death; the *baron* dieth, and the *feme* ſurvived. The queſtion upon demurrer was, If this be a good leaſe to charge the poſſeſſion of the *feme?*

It was firſt moved that it was a void leaſe, becauſe it was not to commence till after the death of the *baron*; and it might be that he might overlive the whole term: and it is all one as if he had granted the term to commence after his death, which had been void.

Second point, He dying before the term commenced, the intereſt is veſted in the *feme.*

But it was adjudged a good leaſe. For as to the firſt, it is not like the caſe put, for there nothing paſſed until his death; but here a good term is created in intereſt, although not in poſſeſſion.

For the ſecond point, the *baron* having an intereſt to *diſpoſe* of in his life, he might diſpoſe of all the term, and it ſhould bind the *feme:* ſo when he hath diſpoſed by an act executed in his life of the intereſt of the term, and hath created a term in intereſt, this is as good as if he had granted all the term. And ſo it was adjudged. 1. *Co.* 155. a.

A huſband may make a leaſe of lands held in joint-tenancy with his wife, to commence after his death; and it will be good, though the wife ſurvive. Ante, 152. Co. Lit. 466. 1. Co. 155. a. Moor, 395. Poph. 4. 3. Bac. Abr. 308. 1. Wood's Con. 171. Cowper, 201. Dougl. 53.

Martidale

CASE 3.

Martidale *againſt* Martin.

A deviſe of lands "upon "truſt and con- "fidence, that "out of the pro- "fits the devi- "ſees ſhould "erect a free- "ſchool," is not reſtrained by 23. *Hen.* 8. c. 10. nor do theſe words create a condition.

1. Co 25. b. 2. Leon. 154. Moor, 594. Bendl. 287. Poph. 8. 1. Bro. Caſ. Ch. 13. 61. 81. 271. 444.

EJECTIONE FIRMÆ, by the leſſee of *Sir Edw. Clere* againſt the leſſee of *Peacock*, for certain lands in *Theiford*.—Upon ſpecial verdict the caſe was, An anceſtor of *Sir Ed. Clere* deviſed certain land to divers and their heirs (under whom *Peacock* claimed) to the uſe of them and their heirs, upon this truſt and confidence, that they out of the profits of it ſhould erect a free-ſchool, and pay ſo much to the maſter yearly, and ſo much to the uſher, and ſhould give ten pounds *per annum* to five poor men; and it was found, that the land was not ſo employed, nor any ſchool erected, &c. and, If this were a condition for breach whereof *Sir Ed. Clere* might enter? was the queſtion.—There were two points in the caſe. Firſt, If theſe uſes were void by the 23. *Hen.* 8. c. 10.? Secondly, If it were a condition?—After argument, all THE JUSTICES held, Firſt, That it was not reſtrained by the 23. *Hen.* 8. c. 10. for that was only to reſtrain ſuperſtitious uſes, and never intended to reſtrain uſes that were in favour of learning, and relief of the poor. *Vide* 1. *Co. Porter's Caſe.* Secondly, They reſolved it was no condition; for the words being upon truſt and confidence, ſhew that he repoſed truſt in them, and would not have the land return for non-performance of it; and there can be no more apt words to ſhew his intent, and not to tie the land with a condition.

2. Leon. 33. 1. And. 139. Poph. 8.

POPHAM cited *Machin's Caſe* (which was entered *Mich.* 29. & 30. *Eliz. Roll* 649.) where the leſſor deviſed his land to his leſſee for years, for the ſame term he had before, and paying the ſame rent, and at the ſame days and upon the ſame covenants which were in the firſt leaſe. And the queſtion was, If this were a leaſe conditional, that his leaſe ſhould ceaſe if he did not perform the covenants? And adjudged it was not; for the firſt covenants were only by way of covenant, and not conditional. And here it cannot be by way of covenant; and therefore the deviſe as to that was void, and ſtood for the reſidue.—And afterwards it was adjudged for the leſſee of *Peacock*.

CASE 4.

Juſtice Fenner *againſt* Fiſher.

Treſpaſs may be maintained without ſhewing title; and therefore, though the plea confeſſes and avoids the plaintiff's title, it is ſufficient if the replication traverſes, or denies the matter alledged by the defendant. Ante, 64. Poſt. 395. 671. 754. 798.

TRESPASS. The defendant juſtified, for that *Jo. Wright* was ſeiſed in fee, and let to him for years; that the plaintiff, claiming by colour of a deed of feoffment, where nothing paſſed, entered, &c. The plaintiff replieth, by proteſtation, that *Wright* was not ſeiſed in fee; *pro placito* ſaith *quod non demiſit.* Upon this iſſue was joined, and found for the plaintiff. It was now moved in arreſt of judgment, that the plaintiff hath not made any title to himſelf in his replication.—But all THE JUSTICES held it good enough; for in this action a man need not make any title to himſelf; but otherwiſe in an aſſiſe, or other real action. Alſo by the defendant's plea, that the plaintiff entered by colour of a deed of feoffment, in that he doth admit him to be tenant at will, which is not deſtroyed. And it was adjudged for the plaintiff. *V.* 18. *Edw.* 4. 26. 3. *Ed.* 4. 18. 22. *Edw.* 4. "*Treſpaſs*" 140. 6. Co. 24. a. Cro. Jac. 19. Poſt. 378. Stra. 1238.

Appleton

Appleton *againſt* Burr.

CASE 5.

ERROR of a judgment in the common pleas, in an action upon the caſe againſt the plaintiff, ſheriff of *E.* for ſuffering a priſoner to eſcape who was arreſted by a *capias* upon an original writ.

A declaration for an eſcape, need not ſhew *where* the priſoner was delivered, nor alledge non-appearance at the return of the writ. S. C. ante, 158.

FIRST ERROR, It was alledged, that the ſheriff directed his warrant to the bailiff of the franchiſe to arreſt him, who arreſted him, and delivered him to the under-ſheriff *in eâ parte authorizat'*, *&c.* and ſhewed no place where the bailiff delivered the priſoner, for it may be it was out of the county.

SECOND ERROR. It was not ſhewn, that the priſoner did not appear at the day; and if he did appear, the plaintiff was at no loſs.—*Sed non allocatur*; for the ſhewing of the place was but an inducement to the action; and when he pleaded not guilty, the eſcape is the matter material: and to the ſecond, though he did appear, yet the *tort* is not purged. And the judgment was affirmed.

CASE 6.

Charnock *againſt* Sherrington.

ERROR. For that *Sherrington* recovered againſt one *Worſely* in debt, and afterwards *Worſely* enfeoffed the plaintiff of his land; and then *Sherrington* ſued an *elegit* upon the judgment; and the plaintiff before execution made, ſued this writ of error, and would aſſign error in the judgment. And it was demurred in law if the writ did lie.—CURIA. It ſeemeth it did not. Firſt, That the feoffee cannot have a writ of error, except it be for error in ſuing the execution. Secondly, Till execution ſued, he is not a party grieved; and this was the reaſon that he in the reverſion or remainder ſhall not have error in the life of the *tenant for life*, upon a judgment given againſt the tenant for life, becauſe he was not a party grieved; but he might have it after the death of the tenant for life, before the ſtatute.—But EGERTON ſtrongly urged the contrary, becauſe the land is liable to the execution. *Vide* 18. *Edw.* 3. 25. 4. *Dyer*, 1. 2. *Edw.* 4. 24. *Poſt.* 294.

A man enfeoffed after judgment had againſt the feoffor, cannot have a writ of error, until he is aggrieved by the execution. 3. Co. 4. a. Poſt. 294.

CASE 7.

Graves' Caſe.

ACTION FOR WORDS: "*Mr. Wingfield*, you never thought "well of me ſince *Graves* did ſteal my lamb."—Adjudged actionable; although it was alledged in arreſt of judgment, that it was not a direct affirmance that *Graves* did ſteal it.

Words actionable.

CASE 8.

Levet's Caſe.

ACTION FOR WORDS. And declared, That the plaintiff was an *inn-holder* in *D.* The defendant ſpake theſe words: "Thy houſe is infected with the pox, and thy wife was laid of "the pox."—Adjudged actionable; for it ſhall be intended the great pox; and if it were the ſmall-pox, yet they were actionable; for it is a diſcredit to the plaintiff, and guells would not reſort thither. And it was adjudged for the plaintiff, and fifty pounds damages given.

Words actionable. Ante, 214. Poſt. 582. 4. Co. 17. a.

Case 9.

If a *feme cognisor* being named in the writ, be omitted to be named in the summons, the whole fine shall be reversed. Ante, 124.

Baxter and his Wife *against* Mounting.

ERROR to reverse a fine. The error assigned was, That the *baron* and *feme* and the third person levied the fine, and the writ of covenant was against the *baron* and *feme* and the third person; and in the summons the *feme* was left out.—COKE moved, that for this error the whole fine shall be reversed; and it being ill in part, is ill in all. 2. *Edw.* 3. *pl.* 39. 27. *Hen.* 6. *pl.* 6. 10. *Edw.* 3. *pl.* 1. 50.—And so was the opinion of THE COURT: but they would advise.

Case 10.

A person who has two parts of the reversion of a house may bring *waste*, though the defendant holds by several titles; and if default is made *after appearance*, it is a confession of the waste, and the enquiry shall be of the damages only. Ante, 234.

Owen, 11. Poph. 24. Co. Lit. 53. 3. Bl. Com. 229.

Warneford *against* Haddock.

Michaelmas Term, 33. & 34. *Eliz. Roll* 47.

ERROR to reverse a judgment in an action of waste.

FIRST ERROR. In the action of waste the defendant appeared upon the distress, and after declaration made no answer, but judgment was given against him by *nihil dicit:* and upon the writ awarded to inquire of the waste and damages, the sheriff went not to the place wasted, but inquired of it at another place; and this was assigned for error.—*Sed non allocatur*; for when judgment in waste is given upon a demurrer or *nihil dicit* the waste is confessed, and the writ shall be only to inquire of damages; and although the writ do command the sheriff to go to the place, this is but of form and nugation; but otherwise it is where judgment is given by default before appearance: so is 3. *Eliz. Dyer*, 204.

SECOND ERROR. He assigned the waste in a house, and by his title it appeared the plaintiff had only two parts of the reversion of the house.—*Sed non allocatur*; for although he hath but two parts, yet he shall punish the defendant for waste done in that which was held of the plaintiff; and the messuage being entire, he cannot assign the waste otherwise; and he did count according to his title.

THIRD ERROR. Because it did appear the defendant had the two parts by several demises; and therefore, though the plaintiff had the reversion in one hand, yet he ought to have several actions.—*Sed non allocatur:* for he having counted upon the whole matter, it is as several counts; and he may well join them in one action.

In *Easter Term*, 35. *Eliz.* the case was moved again; for that it doth appear by the count, that the defendant held one part of the demise of the plaintiff, and the other of the demise of a stranger, which had granted his reversion to the plaintiff; so as he had the reversion by several titles, he cannot maintain this action. And although he hath declared specially how he held it, *ex dimissione & assignatione*, this will not aid him; but if he had made several leases he might have had one action of waste, as 44. *Edw.* 3. is.—But ALL THE JUSTICES held the contrary; for inasmuch as he hath shewn the truth of his case in his declaration, and he hath the reversion in one hand, he shall maintain this action.

FOURTH ERROR. That the sheriff had taken an inquest to inquire of the waste; whereas the judgment being by confession, it ought not to be inquired.—But because divers precedents were so, it was awarded no error. And the judgment was affirmed.

Note. In this term died SIR ROGER MANWOOD, *Chief Baron*; and he was succeeded by SIR WILLIAM PERIAM, *Knt.* one of the Judges of the Common Pleas.

Hilary

35. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
Edward Fenner, *Eſq.* } *Juſtices.*
John Clench, *Eſq.*
Sir Thomas Egerton, *Knt. Attorney General.*
Sir Edward Coke, *Knt. Solicitor General.*

Sharley *againſt* Richardon.

CASE 1.

Hilary Term, 34. Eliz. Roll 462.

An award of general releaſes, with a *proviſo* that the award ſhould be void if the parties diſliked it in 20 days, is good for the firſt part, though the *proviſo* is void.

S. C. Poph. 15. 1. Sid. 59.

DEBT upon an obligation of 50 l. The condition was, To perform the arbitrament of *Walter Bolton* and *Edw. Price* of all actions, &c. The defendant pleaded they made no arbitrament. The plaintiff by replication ſhewed that they made an award, *ſcilicet*, that each of them ſhould give to the other, within four days after the award, a general releaſe of all demands till the date of the obligation: *proviſo ſemper*, that if either of them diſliked the award within twenty days after the award, and ſhould pay to the other, within the ſaid twenty days, ten ſhillings, that then the arbitrament ſhould be void, and it ſhould be lawful for them to ſue their actions, &c. one againſt the other. Upon this it was demurred; and argued by TANFIELD of the one part, and LEWIS of the other.—And after argument it was adjudged for the plaintiff. For all THE JUSTICES held, that the firſt part of the award was good; and the *proviſo* being repugnant and contrariant to the premiſes, is wholly void; and for the non-performance of that part which was good, the action did lie: for when they awarded that they ſhould releaſe each to the other within four days, by non-performance of it the bond was forfeited: then the *proviſo*, that upon payment of ten ſhillings all ſhould be void, this cannot ſave the bond, which was before forfeited: and when one hath releaſed to the other; the other, if the *proviſo* be good, might tender the ten ſhillings to make the arbitrament void, which would not avoid the releaſe. And it was adjudged for the plaintiff.

Ridler *againſt* Punter.

CASE 2.

Fraudulent grant. 3. H. 7. c. 4. 1. Hale, 248. Cro. Jac. 512. Hob. 214. 1. Hale, 248. 10. Co. 15. b. Poſt. 816.

EJECTIONE FIRMÆ. It was found upon ſpecial verdict, that *W.* and his wife being poſſeſſed in right of the wife of a term which ſhe had as adminiſtratrix to *C.* her firſt huſband; and *W.* being indebted by contract, granted the term to *Coleman*, to the uſe of *W.* and his wife for their lives, and after to the uſe of *Coleman* himſelf. *W.* is ſued for this debt, and recovery againſt him; and a *fieri facias* being awarded to the ſheriff, he for this debt of *W.* ſold the term to the plaintiff. The queſtion was, If

See 2. Com. Dig. title "Covin."

RIDLER *againſt* PUNTER.

this ſale were good?—It was moved, that this grant of a term, being but a chattel, and to the uſe of the grantor himſelf, is void by the ſtatute of 3. *Hen.* 7. c. 4.

CURIA *contra.* For the preamble of the ſtatute is, where grants were made by fraud or covin of chattels to the uſe of the grantors themſelves, to defraud creditors or others, that they ſhall be void; but this grant is not to avoid creditors: for the term being in right of the wife as adminiſtratrix, if it had ſo continued in the hand of *W.* and had never been granted, this was not extendible for the debt of *W.*; and if *W.* himſelf had it as executor, it was not extendible for his proper debt; and fraud ſhall not be intended, except it be expreſsly found. And this grant is out of the ſtatute of 39. *Hen.* 7. c. 4. and all other ſtatutes of that nature. Wherefore, &c.

See 13. Eliz. c. 5. and 27. Eliz. c. 4.

CASE 3.

East *againſt* Harding.

It is a cauſe of forfeiture for a copyholder to cut trees without a cuſtom to ſupport it. *Sed quære*, if it be for reparation? Ante, 5. Poſt. 499. 1.

TRESPASS for cutting of trees. The queſtion was, If it be a forfeiture by the common law for a copyholder to cut trees, without a ſpecial cuſtom for it?—GAWDY and POPHAM held it was, for it is to the lord's diſinheritance; and is not allowable for a copyholder to do it without a cuſtom; and if he did it, it was a forfeiture.—But by POPHAM, if it be found that he did it for reparation of the houſe, by which it is made better, there, peradventure, it is otherwiſe.

1. Roll. Abr. 508. Gilb. Ten. 237. 2. Term Rep. 746.

CASE 4.

Gregory *againſt* Nevill.

A declaration on a promiſe in conſideration of relinquiſhing a rent, muſt ſhew that the relinquiſhment was by deed.

ASSUMPSIT. That whereas *M.* the leſſee for life of land, the reverſion to the defendant, had granted to the plaintiff a rent of ten pounds out of it; in conſideration that the plaintiff promiſed to relinquiſh the rent, the defendant promiſed to pay him thirty pounds; and alledged in fact, that he did relinquiſh the rent, and did not claim it, &c. Upon *non aſſumpſit* it was found for the plaintiff.—And upon motion in arreſt of judgment, it was reſolved, that the declaration was not good, becauſe he ſhewed not how he relinquiſhed the rent; for it might be by words, which was no diſcharge.

CASE 5.

Bagnal *againſt* Sacheverell.

If a verdict find a different *aſſumpſit* than that ſtated, it is bad. Ante, 133. 147. Co. Lit. 227. Stra. 844. 887. 1089. Cowp. 766. Dougl. 666. 1. Term Rep. 240. 447.

ASSUMPSIT. For that whereas the defendant was indebted to him in 50l. he promiſed to pay it. The jury found, that *quoad* 47l. parcel of the ſaid 50l. he did aſſume to pay it, &c. *quoad reſiduum* "*non aſſumpſit.*" It was moved, If upon this verdict the plaintiff ſhould have judgment?—And reſolved he ſhould not, becauſe it was found that he did aſſume only for part, ſo the ſame *aſſumpſit* was not found that the plaintiff did declare upon; and although it was upon an *indebitatus aſſumpſit*, it would not alter the caſe (*a*).

(*a*) But it is now holden, that as the promiſe upon which an *aſſumpſit* is founded, cannot extend further than what is juſtly due; the jury, in aſſeſſing damges, may divide them in ſuch a manner that the plaintiff may recover what is juſtly due. Thompſon v. Spencer, Eaſt. 8. Geo. 3. in K. B.

Nedham

Nedham *againſt* S. Corſellis, *an Alien.*

CASE 6.

ACTION FOR WORDS. For that whereas *J. Clerke* brought an *aſſumpſit* againſt the defendant; and they being at iſſue upon it, the plaintiff being produced as a witneſs at the trial at *Guildhall* before WRAY, *Chief Juſtice*, for *Clerke*, and upon his oath gave evidence to the jury; the defendant *ſuper hoc* immediately ſaid, "Thou haſt forſworn thyſelf," *innuendo* "in the ſaid "oath." Upon this declaration the defendant demurred.—And it was adjudged that the action lay upon theſe circumſtances; for it was *ſuper hoc immediatè, &c.* after he took the oath, and it is *innuendo* the ſaid oath.

Words actionable.

A writ of enquiry of damages was awarded.—And it was held that upon this writ the inqueſt ſhall be all of *Engliſh*, and no part of aliens, for it is out of the ſtatute. 28. *Edw.* 3. c. 13.

The jury ſhall be *all Engliſh* upon a writ of enquiry againſt *an alien.*

Sherwood *againſt* Winchcomb.

CASE 7.

PROHIBITION. The plaintiff declared, That whereas king *Henry* the eighth was ſeiſed of the manor of *D.* of which a portion of tithes of ſuch a place was parcel time out of mind, &c. conveyed it to him, and he was impleaded in the court chriſtian for theſe tithes, &c. Upon this declaration it was demurred; for tithes cannot be parcel of a manor; for they are things ſpiritual, for which at common law a common perſon cannot ſue; and being of a diſtinct nature, cannot belong to a manor. 10. *Edw.* 3. *pl.* 5. 9. *Hen.* 7. *pl.* 46. *Edw.* 3. *cattalla felonum* cannot be parcel of a manor; and although the king may have tithes, yet he hath them not as a lay fee.—And of that opinion were all THE JUDGES, that he cannot preſcribe for tithes as parcel of a manor; but if he had preſcribed to have *decimam partem granorum*, this had been good, but not *portionem decimarum*. And a conſultation was granted. *Vide* 2. *Co.* 45. b.

Tithes cannot be preſcribed for as parcel of a manor.

Poſt. 413. 599. 763. 814.

1. Ro. Ab. 498. Moor, 355. Hob. 206. 11. Co. 13. 1. Saund. 142. 2. Co. 45. 5. Bac. Ab. 87.

Scavage *againſt* Beauchamp.

CASE 8.

ACTION upon the caſe, by a ſheriff againſt the defendant, becauſe he was a priſoner and in execution, *et violenter* eſcaped. The defendant pleaded, that before the time of the eſcape the under-ſheriff (*a*) carried him out of the priſon to ſuch a place, which was out of the juriſdiction, and afterwards brought him back again, and there he remained till the time of the eſcape ſuppoſed, and then he went out, as it was lawful for him. Upon this it was demurred in law.

A ſheriff may bring an action againſt a priſoner for having eſcaped; *ſed quære*, if he has been carried by the under ſheriff out of the juriſdiction. Ante, 53.

Firſt, It was moved, that an action did not lie for the ſheriff againſt a priſoner for an eſcape, for he ought to keep his priſon at his peril.

Moor, 597. 2. Term Rep. 5. 126.

CURIA *contra*. And ſo it was ruled in *Holt v. Hill*; for the priſoner by law is to remain in the place whereto he is committed. And as to the matter, THE JUSTICES conceived, if the priſoner be once by the act of the under-ſheriff carried out of priſon to another place out of his juriſdiction, although he be brought again to the priſon, he is not in execution, and need not tarry: but they would adviſe.

(*a*) Gaoler. *L. C. B.* PARKER's *MSS.*

Case 9.

Levett *againſt* Farrar.

A writ on the ſtatute of *Northampton*, directed to the ſheriff by his name of office, may be executed by the under-ſheriff.

FALSE IMPRISONMENT. The defendant juſtified, for that a writ upon the ſtatute of *Northampton*, 2. *Edw.* 3. c. 4. was awarded 30th *July*, 32. *Eliz.* to the ſheriff, and to the juſtices of the peace of the county of *Norfolk*, to remove a force; and he being under-ſheriff, by the commandment of the ſheriff went to the places, and found the force; and becauſe he was not able to remove it, he made proclamation that every one ſhould depart and leave their weapons, &c. And afterwards he enquired of the force; and it being found that the defendant was one of them that made the force, the defendant 6th *Auguſt*, afterwards by virtue of the ſaid writ did arreſt him, and committed him to priſon; and ſo juſtifieth.

Poſt. 440. 2. Hawk. 267.

Upon this the plaintiff demurred. Firſt, Becauſe this is a commiſſion to the ſheriff, which the under-ſheriff cannot execute. Secondly, He ought to commit him at the ſame time when the force was done; and cannot arreſt him afterwards, when the force is ended. Thirdly, Becauſe it is not averred that he was under-ſheriff at the time of the arreſt.

But THE COURT, notwithſtanding theſe and other exceptions, held the plea good. For when it is directed to the ſheriff by the name of his office, and not by a particular name, nor doth expreſsly command him to do it in perſon, the under-ſheriff may do it, for it is a writ grounded upon the ſtatute; and not a commiſſion, for then it had been otherwiſe. Secondly, The arreſt is lawful at another time; for if the force had been removed before his coming, yet if by enquiry it be found that a force was done, and who did it, he may arreſt them at another time; and it is not like the ſtatute, that the auditors may commit the accountant, for there he is before them. Thirdly, It ſhall be intended he continued under-ſheriff, when in the ſame plea it is alledged he was under-ſheriff, and the contrary is not ſhewn. And it was adjudged for the defendant.

Case 1.

Scroggs *againſt* the Lord Mordant.

Hilary Term, 35. Eliz. In the Exchequer Chamber.

An adminiſtrator may ſue a writ of error, although the execution was againſt the teſtor by *elegit*. Ante, 289. Cro. Car. 142. 1. Ro. Ab. 749. 11. Co. 112. Palm. 254. 6. Co. 80 a.

THE plaintiff, as adminiſtrator of *Bridges*, brought a writ of error to reverſe a judgment in *ſcandalis magnatum* in the queen's bench.

FIRST, The defendant alledged, that the writ of error lieth not; for this writ of error is given by the 27. *Eliz.* c. 8. and the ſtatute is, that "the party, plaintiff or defendant, ſhall have a "writ of error;" but ſpeaketh not of the heir, executor, or adminiſtrator.

SECONDLY, That execution was ſued againſt the teſtator by *elegit*, and the lands only were extended; but no goods delivered in execution, ſo the adminiſtrator had no loſs: and when he had no loſs, he cannot be reſtored to any thing.

But

Scrogge *againſt* Lord Morgant.

But THE COURT reſolved for both points, that the writ of error did well lie. For as to the firſt, it is within the intent of the ſtatutes (*a*), for which the ſtatute (*b*) did provide. And as to the ſecond, he is privy to the record; and may have loſs by it *in futuro*. And in many caſes he that hath no loſs, nor can have loſs, may maintain a writ of error; as the tenant which makes a feoffment pending the writ againſt him. So in treſpaſs againſt two, and execution of the damages is had againſt one only, and the plaintiff is ſatisfied, and he againſt whom the execution was, died, yet the ſurvivor may ſue a writ of error; and for this point 20. *Edw.* 3. was cited. Whereupon it was awarded that the writ did lie; and that the defendant ſhould anſwer. *Vide* 6. *Co.* 80. —NOTA ALSO, that it may be that the execution of the land may be avoided, and then the adminiſtrator may be damnified.

(*a*) Weſtm. 1. 3. Edw. 1. c. 34. 2. Rich. 2. c. 5. 12. Rich. 2. c. 12.
(*b*) 27. Eliz. c. 8.

Eaſter Term.

35. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*

Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.*
Edward Fenner, *Eſq.*
} *Juſtices.*

Sir Thomas Egerton, *Knt. Attorney General.*
Sir Edward Coke, *Knt. Solicitor General.*

CASE 1.

Munday *againſt* Cordal.

Hilary Term, 35. Eliz. Roll 60.

Words actionable.

Cro. Car. 326. 1. Hawk. P. C. 338. 2. Bac. Ab. 568.

ACTION for theſe words: "Thou art a forger, and art ſued "in the ſtar-chamber for going by one *Sedge*." It was after verdict moved in arreſt of judgment, that an action did not lie for thoſe words; for it is not ſhewn what thing he forged, and how he was ſued, for it might be, it was without cauſe. —But THE COURT gave judgment for the plaintiff; for when he ſaid, "Thou art a forger," this is intended of ſuch a thing of which forgery might be, and to be ſpoken in the worſe part; and when he ſaid, "he is ſued in the ſtar-chamber," this doth aggravate it, that he did ſuch a forgery for which he is ſuable there.

CASE 2.

Barley's Caſe.

Autrefois convict of man-ſlaughter in an appeal of murder, is a good plea to an indictment for the ſame offence.

2. Hawk. P. C. 535, 536. and the caſes there cited.

(a) Ante, 276.

HE was indicted for the murder of *Weatherhead*. On being arraigned upon it, he pleaded, that *Ann* the wife of *Weatherhead* brought an appeal againſt him for this murder; and he was arraigned upon it, and pleaded not guilty; and tried, and found by the jury that he was not guilty of murder, but that he was guilty of man-ſlaughter; and thereupon he prayed his clergy, and had it; and demands judgment, if he ſhall be again put to anſwer this felony. Thereupon it was demurred.—And now this term it was judged a good plea; and thereupon he was openly in court diſcharged, but no ſpecial reaſon was given of the judgment. *Quære*, for the finding him guilty of man-ſlaughter in the appeal was more than needed, as it appeareth in *Wroth v. Wiggs* (*a*), and then the allowance of clergy is to no purpoſe, &c.

CASE 3.

More *againſt* More and his Wife.

Damages muſt be ſeverally aſſeſſed, where the defendants are ſeverally guilty. Co. 10. 131. a. Doug. 577. 730.

ACTION for words againſt the *baron* and *feme*, for words ſpoken by the *feme*, and alſo for words ſpoken by the *baron*. The defendants did confeſs the action; and upon a writ of enquiry of damages, the damages were *entirely* aſſeſſed.—And it was held ill, and for this cauſe the judgment was ſtayed; for the damages ought to be ſeverally aſſeſſed for the ſeveral words. *Vide* 9. *Edw.* 4. f.

Green

Green *againſt* Dancy.

CASE 4.

ACTION for theſe words: "Thou art falſly forſworn in *Bell-* "*court*," *innuendo*, a court baron held at *Bell.*—And PER CURIAM, with this *innuendo* the action did lie, otherwiſe not.

Words not actionable. Ante, 135. Poſt. 209. 348.

Lee *againſt* Secombe.

CASE 5.

ACTION for theſe words: "He was falſly forſworn in the "court of the *Biſhop of Exon*, at *Exon.*" It was moved in arreſt of judgment, that it doth not appear he was ſworn in any judicial court; for it may be in the yard of the biſhop, which is called his court.—FENNER, *Juſtice*. It is known to us that every biſhop hath his court, that is, his conſiſtory to determine cauſes; and it ſhall be intended he was forſworn there.—The plaintiff had judgment.

Words actionable. Ante, 183. 1. Hawk. P. C. c. 69. ſ. 3. 4. Bac. Abr. 499.

Levermore *againſt* Martin.

CASE 6.

ACTION for theſe words: "Thou art forſworn and perjured." The jury found a ſpecial verdict, That the defendant ſaid the plaintiff was "a forſworn fellow." To whom the plaintiff ſaid, "Will you ſay I am perjured?" The defendant ſaid, "Yes, "if you will have it."—THE COURT conceived, that upon this matter an action did not lie: and it was adjudged for the defendant.

In ſlander the words muſt be proved as they are laid.

Butler *againſt* Paynter.

CASE 7.

ACTION FOR WORDS. For that whereas the plaintiff was a juſtice of the peace, the defendant ſaid, "You do "openly maintain and countenance the worſt people, againſt "God's laws and the queen's." After verdict it was moved, that an action did not lie for theſe words; for it is not ſhewn who theſe people are which he intended were the worſt people, *viz.* rogues, hereticks, or the like; and it is not ſhewn that he did know them to be ſuch perſons, nor in what he did maintain them.—And of that opinion were FENNER and CLENCH.—But POPHAM, *Chief Juſtice*, *contra*; for they found to his diſcredit. And he ſaid, it was adjudged upon good deliberation, in a caſe between *Sir Hen. Portman* and *Stowell*, that for theſe words, "Thou maintaineſt "ſuch a ſuit," an action did lie, for maintenance is unlawful and odious; and it is here alledged to be ſpoken *malitioſe*, and cannot be intended but he maintained them in their naughtineſs.—Afterwards, *Mich.* 35. & 36. *Eliz.* the caſe was moved again: and it was held by THE WHOLE COURT that the action did not lie, for the words are too general to maintain an action.

Words of too general an import will not ſupport an action of ſlander. Yelv. 21.

More *againſt* Roſwell.

CASE 8.

Hilary Term, 35. *Eliz. Roll* 22.

DEBT upon an obligation, The condition was, to perform covenants of ſuch an indenture; and the breach aſſigned in this, that the defendant did covenant to aſſure ſuch land by ſuch aſſurance as by the counſel of the plaintiff ſhould be deviſed: and alledged, that the plaintiff cauſed ſuch an aſſurance to be drawn

A covenant to execute ſuch a deed as a particular counſel ſhall adviſe, is not broken by refuſing to execute a deed drawn by the party. Poſt. 465. 5. Co. 19. b. 1. Roll. Abr. 466. 2. Com. Dig. 155. 1. Wood's Con. 288. 396.

and

More *against* Roswell.

and engrossed, and put wax to it, and required the defendant to execute it, and he refused. Upon this the defendant did demur.

Harris, *serjeant*, moved, that no breach of the covenant was shewn; for when he is to make such assurance as the counsel of the plaintiff shall devise, and the plaintiff himself doth devise it; this is no breach, for he is not compellable to make it. 6. *Hen.* 7. *pl.* 4. 26. *Hen.* 8. 17. *Edw.* 4.

Gawdy, *Justice*. This clearly is no breach; for when it is referred to such an assurance as counsel shall advise, this shall be intended such assurance as shall be reasonably advised, and not in such manner as the party himself of his own head shall advise, which peradventure may be unreasonable.

Ante, 9.

Afterwards being moved again at another day, all the Court was of the same opinion (*a*), for which the plaintiff would have been non-suited; but he could not, because he appeared the same term (*b*); and therefore he prayed advisement till the next term, to the intent to be nonsuited, and to discontinue it.

(*a*) Vide post. 465*. Clipton v. Gibbon, *cont.*

(*b*) Watkins v. Towers, 2. Ter. Rep. 275.

Case 9.

Stafford *against* Bottorne.

Hilary Term, 35. *Eliz.* *Roll* 647.

In an *assumpsit* on a promise to make such an assurance as the plaintiff's counsel should advise, it is sufficient to state that the counsel advised the plaintiff, and that the plaintiff gave notice of it to the defendant. Post. 465. 5. Co. 19. b. 1. Lut. 680. 3. Mod. 191.

Assumpsit. For that the defendant, upon such consideration, promised to make to the plaintiff such assurance of the rectory during their joint lives, as shall be devised by the counsel of the plaintiff; and alledged *in facto*, that one *Jo. Morris* was of his counsel, and that he gave his advice that the defendant should make a lease by indenture, &c. and that the plaintiff himself *postea apud L. dedit notitiam* to the defendant of the advice of the said *Jo. Morris*, and required him to perform it, which he had not done.

After verdict Godfrey moved in arrest of judgment, that the counsellor is to give notice of the advice to the defendant, and not to the plaintiff; for perhaps he will not speak it truly; and the defendant is not bound to give credit to his report: and so is 11. *Hen.* 7. *pl.* 21.

Coke *contra*. For being the counsellor of the plaintiff, he is to give his advice to the plaintiff; and he to notify it to the defendant. 11. *Hen.* 7. *pl.* 23. 8. *Edw.* 4. *pl.* 22. 14. *Hen.* 8. *pl.* 21.

And the defendant is not at any mischief, for he is not to do it without notice; and if notice be given, he is to do it at his peril, if it stand with the agreement: and if the plaintiff giveth notice to make such an assurance, and he doth it, although it be not advised by counsel, this shall excuse him; and if the plaintiff shall afterwards say that the counsel advised any other assurance, he need not make it, for the plaintiff is not to vary from his first request.

Popham, *Chief Justice*. If the words were, that he shall make such an assurance as the counsel of the plaintiff shall advise the defendant, it is no doubt but the counsel must notify it to the defendant; and if the words were as the counsel of the plaintiff shall advise him, it is no doubt that notice is only to be given to the plaintiff: but the words here are, "as by the counsel of the "plaintiff shall be devised," which doth stand indifferent; and he conceived it sufficient to be given to the plaintiff; and he shall give notice thereof to the defendant: for in the performance of every condition, every one is to perform that which

Ante, 9.

lieth

lieth in his notice; and therefore if the promiſe be, that you ſhall make ſuch aſſurance as my counſel ſhall adviſe you, I ought to give notice who is of my counſel. It was ruled in a *Wiltſhire* caſe, where one made a leaſe for years, with a *proviſo*, that if he tendered ten ſhillings at the cathedral church of *Sarum*, at any time during the term, that the leaſe ſhould be void; he was bound to give notice to the leſſee when he would be there to tender, for the time was incertain. (*Vide* 18. *Eliz. Dyer*, 354.) Another caſe was ruled, that if one be obliged to another to pay ſo much to him, when he came next to *Paul's*, he ought to give notice when he would come next thither. So here it is to be expounded with reaſon, for the counſel of the plaintiff is not bound to travel to ſeek the defendant; and if he give counſel to the plaintiff, and he give notice to the defendant, this is ſufficient, and there is no miſchief to the defendant; for if the plaintiff doth report it to him falſly, yet if the defendant doth perform it, it is ſufficient, and he cannot vary from it, but hath diſpenſed with the defendant for any other, and ſhall not ſay afterwards that the defendant hath done it according to the advice; and this is the ſureſt way.—Of that opinion were FENNER and CLENCH (*abſente* GAWDY): and it was afterwards adjudged for the plaintiff. *Vide* 5. *Co.* 19. b.

STAFFORD *againſt* BOTTORNE. Co. 8. 92 a. Co. Lit. 211. a.

Okes *againſt* Kirby.

CASE 10.

ASSUMPSIT, In conſideration the plaintiff at the defendant's requeſt would ſurceaſe ſuch a ſuit, &c. the defendant promiſed to ſeal him a bond when required, &c. and alledged *in facto* that he did ſurceaſe the ſuit, and the defendant, *licèt ſæpius requiſitus*, ſuch a day and place, had not ſealed it. After verdict it was alledged in arreſt of judgment, Firſt, It is not alledged that he ſurceaſed at the requeſt of the defendant.—Secondly, That the requeſt to ſeal the bond was not by the plaintiff.—*Sed non allocatur*. For as to the firſt, it ſhall be intended, for it is for the defendant's benefit: and to the ſecond, it ſhall be intended, if the contrary be not ſhewn, that it was by the plaintiff, or by his ſervant for him. Wherefore it was adjudged for the plaintiff.

An *aſſumpſit* on a promiſe to ſeal a bond in conſideration of ſurceaſing a ſuit, need not alle dge that the plaintiff *requeſted* the one act to be done, or the defendant the other.

Lewes *againſt* Hay.

CASE 11.

Michaelmas Term, 33. & 34. *Eliz. Roll* 448.

ERROR. For that the judgment was, *et idem* JO. LEWES *in miſericordiâ*; whereas it ſhould be *Thomas Hay*.—It was amended by award,

Amendment.

Bartlett *againſt* Wright.

CASE 12.

EJECTIONE FIRMÆ, For a meſſuage, one rood and two acres of land in *Bridgenorth*, of the leaſe of *Elburne*. The jury, upon not guilty pleaded, find a ſpecial verdict, "that one "*Delborough* was ſeiſed of the houſe, and of two yard-land in *B.* "and that the two acres of land were time out of mind parcel of "the two yard-land; and that the ſaid *D.* let to the ſaid *E.* leſſor "of the plaintiff, all my houſe, and two yard-land in *B.* in the "poſſeſſion of *Geſſe*: and they found, that the two acres of land "were not in the poſſeſſion of *Geſſe*, but that all the reſidue were."

A demiſe of two yard land in *B.* in the poſſeſſion of *G.* will not paſs any parcel of the land in *B.* that is not in the poſſeſſion of *G.*

The

BARTLETT *against* WRIGHT.

The question was, If the two acres do pass?—It was argued by PUDSEY of the one part, and HERNE of the other.

Co. 8. 10. a.

GAWDY conceived it did pass; for when it is named "my house, "and two yard-land in *B.*" this is sufficiently certain, and that which came after is not material; and it is good for all, though no part were in the possession of *Geffe*.—POPHAM accorded. For when the law makes a certainty, that which cometh after and is repugnant is void: as if one grant the manor of *D.* in *D.* and this extends to *D.* and *S.* if he hath demesnes and services in *D.* and *S.* this shall pass only that which is in *D.*; for the words are supplied that a manor passeth; but if he hath demesnes and services only in *D.* then the whole shall pass, for otherwise the grantee shall not have a manor: so here, for that the yard-lands are intire, and he cannot have the yard-land except he have two acres, they shall also pass, and it shall not be restrained by the last clause. So if one hath five acres called *Blacklands*, and he granteth all his acres called *Blacklands* in the tenure of *J. D.* and *J. D.* hath but four of the acres, yet the five shall pass.

Ante, 39.
Cro. Jac. 22.
1. Com. Dig. 27.

Ante, 16.
Post. 474.

CLENCH and FENNER *contra*. For the intent of the parties was to pass only that which was in the tenure of *Geffe*, and yard-land is no such certainty; but when it is referred to another certainty, this shall be good, especially when the grant may be supplied by the land in the tenure of *Geffe*; but if no part were in his tenure, it is otherwise. *Et adjournat'*.—And afterwards, in *Easter Term*, 35. *Eliz.* POPHAM being absent, it was again moved; and, against the opinion of GAWDY, it was adjudged for the defendant.

CASE 13.

Dell *against* Babthorpe.

What shall extinguish a right of way.

1. Roll. Abr. 935.
5. Com. Dig. 518.

TRESPASS. Upon special verdict the case was, *J. S.* had a close, and a wood adjoining to it, and time out of mind a way had been used over the close to the wood to carry and re-carry. He granted the close to one, and the wood to another. The question was, If the grantee of the wood shall have the way?—And it was adjudged he should not; for the grantor by the grant of the close had excluded himself of the way, because it was not saved to him; and he himself could not use it, no more can his grantee. *Vide* 20. *Edw.* 3. "*Admeasurement*" 8.

CASE 14.

Clever *against* Gyles.

Trinity Term, 34. *Eliz. Roll* 865.

What shall be a sufficient deed to declare a use.

2. Co. 73. b. Moor, 786. 2. Ro. Ab. 788. 4. Mod. 264. 267. 5. Co. Dig. 621. Dougl. 45.

EJECTIONE FIRMÆ. It was found by special verdict, that *Knight* sold to *Onely* certain land by deed indented, upon condition of re-entry upon payment of twenty pounds, and that all assurances shall then be to him and his heirs; and covenants to make other assurances, and that they shall be to the uses in the indenture. Afterwards he makes a feoffment to the same bargainee, to the use of him and his heirs; and afterwards levies a fine to him, which was to the uses in the indenture. If by this absolute feoffment to the express use of the bargainee, his estate be conditional or not? was the question.—And adjudged, that notwithstanding the absolute feoffment, and to an express use; yet it being upon

no

no new agreement, this is guided by the covenant, and it ſhall rule it, as well as an expreſs limitation of the uſe. CLEVER *againſt* GYLES.

See 29. Car. 2. c. 3. and 4. &. 5. Ann. c. 16.

Porter *againſt* Gray. CASE 15.

AVOWRY for an amercement in a leet, for not doing ſuit. The plaintiff was non-ſuited, for which the defendant had a return, and he prayed his coſts.—But the opinion of THE COURT was, he ſhould not have coſts; for it is not ſuch a thing for which the ſtatute (*a*) doth give coſts, for it extends only to cuſtoms and ſervices. Qu. If the defendant ſhall have coſts on an avowry for an amercement? Ante. 245. Poſt. 329.

Moor, 839. Cro. Jac. 28. 520. Cro. Car. 534. Carth. 179. 1. Bac. Abr. 523. Dougl. 709. 2. Term Rep. 235.

(*a*) 7. Hen. 8. c. 4. 21. Hen. 8. c. 19. and vide 11. Geo. 2. c. 19. ſ. 22.

Bind *againſt* Plain. CASE 16.

Vide Ante, Page 218. *Caſe* 5.

ERROR. Error aſſigned in the matter of law; and for that the plaintiff did aver, that between the 11th day of *September* and 14 days after *Michaelmas* no challenge or claim was made; and doth not anſwer to the reſidue of the 11th day of *Sept.* if claim was then made. Certainty to a common intent is ſufficient in a declaration. Ante, 218. Poſt. 858.

But POPHAM, *C. J.* and all THE COURT held it good. For it is good to a common intent, and we muſt not pinch ſo upon inſtances of time; and it ſhall not be preſumed that challenge was made, if it were not ſpecially alledged. The law preſumeth all the day to be the day of the promiſe, and that no claim or challenge upon that day, if it be not ſhewn; and in any plea or declaration, it is ſufficient to ſatisfy the common intendment. It hath been adjudged, that where an arbitrament was the 12th of *April*, and the arbitrator awarded that the party ſhall releaſe all actions until the making of the award, in debt upon an obligation for non-performance of the award; he pleaded a releaſe of all actions until the 12th of *April*; and it was adjudged a good plea; for the inſtant of time is not to be reſpected: wherefore the judgment was affirmed. Dougl. 159.

Trinity

Trinity Term,

35. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* *Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Thomas Egerton, *Knt.* *Attorney General.*
Sir Edward Coke, *Knt.* *Solicitor General.*

CASE 1.

Hughes *againſt* Robotham, Executor of J. S.

A leſſee for years may ſurrender to him who has the reverſion, tho' the reverſioner has a leſs term than the leſſee. Ante, 173.

1. Lev. 303. 323. Pop. 31, 32. Co. Lit. 192. 273. 337. 2. Roll. Ab. 494. 2. Vent. 327. 207. Skin. 263. Plowd. 541. 2. Bl. Com. 178. Ld. Raym. 402. 3. Bac. Abr. 458. Shep. Touch. 341.

ASSUMPSIT. That whereas the 14th *April*, &c. the plaintiff was poſſeſſed of a leaſe for years, and the teſtator was poſſeſſed of the reverſion for years, the teſtator, in conſideration the plaintiff would ſurrender to him all his eſtate, promiſed to give him thirty pounds; and alledges *in facto*, that 20th *April*, &c. he ſurrenders, &c. Upon *non aſſumpſit* it was found for the plaintiff.

FOSTER moved in arreſt of judgment, FIRST, It was not alledged that he was poſſeſſed of the entire term at the time of the ſurrender; and it may be he had aſſigned part of it before to another.

SECONDLY, Both parties are termors; one in poſſeſſion, and the other in reverſion: and a termor cannot ſurrender to a termor, for one eſtate cannot drown in the other.

As to the firſt, all THE COURT held clearly that the declaration is good; for it ſhall not be otherwiſe intended, but that the eſtate did continue; and it being but an inducement, it need not be ſo preciſely alledged.

To the ſecond, POPHAM ſaid, it is clear that he who hath an eſtate for ten years, may ſurrender to him that hath an eſtate for twelve years; and the eſtate is drowned, and the other ſhall come in poſſeſſion; and there is no doubt but a ſurrender to him that hath a greater eſtate for years is good, as to him that hath an eſtate for life, which GAWDY did expreſsly affirm; and here it ſtandeth indifferent, if the reverſioner had a greater eſtate for years or not: but if one be leſſee for twenty years, and he let the land for ten years, and he ſurrenders to him that hath the reſidue of the term, this is good to convey his intereſt, but not to drown the eſtate, but he ſhall have the twenty years as before: otherwiſe it is of a ſurrender to another man that hath the reverſion for years.

And

And POPHAM conceived, that if the teſtator had the reverſion for a leſs number of years, yet the ſurrender is good, and the eſtate ſhall drown in it. And if a man be leſſee for twenty years, and the reverſion is granted for one year to another, who grants it to the leſſee for twenty years, this is a ſurrender of the firſt leaſe for twenty years, and is as if he had taken a new leaſe for a year of his leſſor.

HUGHES *againſt* ROBOTHAM.

Quod FENNER, *Juſtice*, affirmed; and ſaid the ſurrender was good, although the reverſion was for a leſs term for years; for here are ſeveral terms out of the reverſion, and one cannot ſtand with the other; but coming together, one ſhall drown the other: and the number of years is not material; for as he may ſurrender to him who hath the reverſion in fee, ſo he may to him that hath the reverſion for a leſſer term: but when leſſee for twenty years, maketh a leaſe for ten years, who ſurrenders; this cannot drown in the other, becauſe it was not to commence until the term expired.—And it was adjudged accordingly for the plaintiff. *V. Hill.* 32. *C. B. Placito* 1.

Ante, 173.
2. Bl. Com. 178.

Michaelmas Term,

35. & 36. Eliz. In the Queen's Bench AT SAINT ALBAN's.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Thomas Egerton, *Knt. Attorney General.*
Sir Edward Coke, *Knt. Solicitor General.*

CASE 1. Balſton and A. his Wife Executrix of M. S. *againſt* Baxter.

Part payment and an agreement to take the reſidue at a future day cannot be pleaded as ſatisfaction in bar to debt on bond. Ante, 46. Poſt. 306. 309. 727. b. 5. Co. 117. a. 6. Co. 44. a. Plowd. 5.

DEBT upon an obligation made to the teſtator to pay 13l. 6s. 8d. dated 29. *April*, 23. *Eliz.* The condition was, to pay ten pounds at the feaſt of *St. Thomas* the apoſtle then next enſuing, at the church porch of *Newton*. The defendant pleaded, that before the ſaid feaſt, *viz. ult. Nov.* 24. *Eliz.* the teſtator did agree with him, that if he would provide for him ſix pounds, and pay it at his houſe in *N.* the 15th day of *Decemb.* next, and would promiſe that he would pay the four pounds reſidue at the feaſt of *St. John Baptiſt* enſuing, that he would accept it in full ſatisfaction of the ſaid ſum of ten pounds; and alledgeth *in facto*, that he paid the ſaid ſix pounds the ſaid 15th day of *December*, and then promiſed that he would pay the reſidue at the ſaid feaſt of *St. John the Baptiſt*; and the teſtator did then accept the ſaid promiſe in full ſatisfaction of the ſaid ten pounds. *Et hoc, &c.* Upon this it was demurred.—This term, upon the firſt motion, without any great deliberation, THE COURT did adjudge for the plaintiff; for this is a concord pleaded, and is executory, and ſo can be no bar in debt upon a bond, no more than in a treſpaſs; and this promiſe to pay the reſidue is a thing in action, and can be no bar of a debt which is certain: as in debt upon an obligation, it is no plea that he accepted another obligation in recompence of it. 11. *Hen.* 4.—But by GAWDY, If he had pleaded payment of a leſſer ſum before the day, and at another place, in ſatisfaction of a greater ſum of money, and had relied upon it, this peradventure had been a good plea.—And they all reſolved in the principal caſe, that it was no good plea to avoid a bond upon ſuch naked matter.

Ld. Raym. 122. 2. Term Rep. 24.

CASE 2. Nevill *againſt* Payne.

In *quo warranto* it is a miſ-trial if the *venire* be of "*a vill*" where the preſcription is in right of "*a manor*," and the *poſtea* ſhall not be certified.

QUO WARRANTO ſued by *Nevill* in the name of the queen againſt the defendant, for claiming a leet within the manor of *Medburne*. The defendant pleaded, that he was ſeiſed in fee of the manor of *Medburne*, and claimed the leet there by preſcription; and the *venire facias* (they being at iſſue upon the preſcription) was awarded of the vill of *Medburne*, and tried againſt the queen: and it was upon motion adjudged a miſ-trial; for the preſcription being, that he had a leet within the manor of *M.* and iſſue joined upon

upon it, the *viſne* was to be of the manor of *M.* and not of the village of *M.* for there was no mention of a village in the record, and the *venire facias* might well be of the manor. NEVILL *againſt* PAYNE.

And then it was prayed, that the *poſtea* might be certified; but becauſe it was miſ-tried, and ſo upon the matter no trial, and being againſt the queen, it was ordered the *poſtea* ſhould not be received; for if it ſhould, the defendant might exemplify the verdict, as duly tried, and it would be an evidence againſt the queen, which ſhall not be ſuffered. 2. T. Rep. 484.

Doctor Cæſar *againſt* Curſeny.

CASE 3.

ACTION FOR WORDS. That whereas the plaintiff was Judge of the admiralty, and *J. S.* had a ſuit againſt the defendant, in which the plaintiff gave ſentence againſt the defendant; the ſaid defendant ſaid, that the ſaid ſentence given by the plaintiff, *innuendo ſententiam prædict'*, &c. was corruptly given. The defendant pleaded not guilty, and found againſt him, and 200l. damages aſſeſſed. It was now moved in arreſt of judgment, that an action did not lie for thoſe words; for it is not alledged, that the ſentence was corruptly given by the plaintiff; for it may be the defendant did intend it was corruptly given by reaſon of the falſe teſtimony of falſe witneſſes, or corruption in them, and ſo touched not the plaintiff.—But THE COURT held, that the words can have no interpretation but in an ill ſenſe, and to be intended of the Judge that gave the ſentence; and ſo it is preciſely alledged in the declaration. Words actionable. 10. Co. 104. 2. T. Rep. 199.

THEN it was moved, that a *tales* was awarded *de circumſtantibus*, which was not to be awarded in this caſe, by the 35. *Hen.* 8. c. 6. for that is intended to be granted when the trial was all by *Engliſh*, and not when the trial is *per medietatem linguæ*; for peradventure it ſhall be all of *Engliſh*, there being none there but ſuch.—But all THE COURT held it within the intent of the ſtatute, and within the letter of it; for it is, that in all actions, &c. *tales* ſhall be awarded as in the bench. But a queſtion could not be, if it were in the bench; and where it was objected, peradventure there ſhall be no ſtranger there, the ſtatute had regard to it, for then no *tales* can be ſerved; for the ſtatute is, *tales* ſhall be awarded *quales*, &c. and ſo ſhall be of ſuch perſons as were of the former return. Juſtices of *niſi prius* may give a *tales de circumſtantibus* on a trial *de medietate linguæ*, for ſo many aliens or denizens as ſhall be wanting. Poſt. 818. 841. 10. Co. 105. Cro. Jac. 316. 2. Hawk. 592.

THIRDLY, It was moved, that the *tales* was miſ-awarded; for there are none returned but aliens, and not *de medietate*, &c.—And THE COURT conceived it to be good. For in this it is ſufficient to return ſo many only, which with the other might make a full jury, but otherwiſe of *tales in banco*; wherefore here when aliens were only wanting, it was ſufficient to return them. And it was adjudged for the plaintiff.

Rayne *againſt* Orton.

CASE 4.

Hilary Term, 34. Eliz. Roll 70.

ASSUMPSIT for 50s. upon an *indebitatus aſſumpſit*. The defendant pleaded, that after the *aſſumpſit* there was a concord between them, that he ſhould give to the plaintiff fifteen ſhillings, parcel of it, and the thirty-five ſhillings reſidue the plaintiff ſhould receive of him in hats; and alledgeth the payment of A concord executory in part cannot be pleaded *tanta ſemus prif.* Plowd. 5. b. T. Raym. 203. 450. Ld. Ray. 122.

RAYNE *against* ORTON.

the fifteen ſhillings, and that he was always ready to pay the reſidue in hats. And upon this it was demurred.—And without argument it was adjudged for the plaintiff; for it being a concord executory in part, can be no plea; for a concord is always to be intirely executed, and not to be executory in any part. And it was adjudged for the plaintiff. 6. *Hen.* 7. *pl.* 9.

Ante, 304. 2. T. Rep. 24.

CASE 5.

Sir Chriſtopher Hilliard *againſt* Conſtable.

"*He is a blood-ſucker, and ſucketh blood,*" are not actionable, though ſpoken of a juſtice of the peace.

ACTION for theſe words: "*Sir Chriſtopher Hilliard* is a blood-"ſucker, and ſucketh blood; but if any man will give him "a bribe, as ſheep, or a couple of capons, he will take them." Upon not guilty pleaded, it was found not guilty as to all the words except "he is a blood-ſucker, and ſucketh blood;" and for them he was found guilty.

3. Wilſ. 184. 2. Bl. Rep. 751. 795.

The opinion of THE COURT was, upon motion in arreſt of judgment, that the laſt words not being found, an action did not lie for the firſt: for though he alledged in his declaration, that he was a juſtice of peace, and one of the council in the north; yet the firſt words cannot be any ſlander, for it cannot be intended what blood he ſucked. And by the advice of the greater part of all THE JUSTICES of *England*, it was adjudged for the defendant (*a*).

(*a*) This caſe was reconſidered, and judgment for the defendant affirmed. Poſt. 433.

CASE 6.

Burton and Eſtove *againſt* Gowell.

Trinity Term, 35. *Eliz. Roll* 92.

A will in writing may be revoked by a parol declaration importing a preſent intention. Owen, 76. Cro. Jac. 115. 3. Com. Dig. 10. Powel on Dev. 524. Gilb. on Wills, 419. Dougl 31. 40. Cowp. 52. 87.

TRESPASS. Upon ſpecial verdict the caſe was, *J. S.* was ſeiſed in fee of land, and by his will in writing made at *Pulham*, deviſed the land to the defendant; and after at *Sterſton* lying ſick *dixit & declaravit*, that his will made at *Pulham* ſhall not ſtand.

The queſtion was, If this were a revocation, becauſe it was by word only, and by words *in futuro*, and not *in præſenti*?

To the firſt it was reſolved, That a will may be revoked by parol only; and ſo is *Harriſon's Caſe*, 14. *Eliz. Dyer.* 310. b.

To the ſecond it was ſaid, That *verba in futuro* ſhall be taken futurely when they refer to a future act, otherwiſe when they refer to a preſent reſolution.—But by POPHAM, if he had ſaid, "I "will revoke my will made at *Pulham*," this is no preſent revocation, for it referred to a future act (*a*). But when he ſaith, "It ſhall "not ſtand;" this takes effect preſently: as if I ſay to another, "You ſhall have my land for ten years;" this is a preſent leaſe. —And it was adjudged a revocation (*b*).

(*a*) Cro. Jac. 497. 1. Ro. Ab. 615. Moor, 874.

(*b*) See 29. Car. 2. c. 3. which reſtrains parole revocations.

CASE 7.

Sherburne's Caſe.

In prohibition, if it appear that the right of tithes are in queſtion, or that the preſcription is not proved, a conſultation ſhall not go. Ante, 71. 136. Poſt. 736. Moor, 907. 1. T. Rep. 427. 552.

PROHIBITION againſt the parſon of *Thachſly* for ſuing for tithes of wood of the park of *Thachſly*. And ſurmiſed, that he and all thoſe, &c. time out of mind, &c. had uſed to pay to the vicar of *Thachſly* ten ſhillings yearly, for all tithes of wood grow-

ing

ing in the ſaid place. The proofs were, that he paid ten ſhillings for diſcharge of tithe-wood in the park, and two other places. SHERBURNE'S CASE.

COKE, *Solicitor*, moved for a conſultation.

Firſt, Becauſe he ſurmiſed he paid ſo much to the vicar in diſcharge of tithes; and by this the right of tithes, between the parſon and vicar, is to come in queſtion, which is merely triable in the court chriſtian, as it hath been twice adjudged in this court, *Mich.* 28. & 29. *Eliz. inter Hunt & Buſh*; and *Mich.* 30. & 31. *Eliz. the Lady Greſham's Caſe.*

Second cauſe. The proofs do not prove the preſcription; for the preſcription is to pay ten ſhillings for the tithes of the wood, &c. and the proofs are of that park, and two other places.—And of that opinion was THE COURT for both points. Cro Car. 576.

But it was adjourned, and no conſultation awarded.

Crouch *againſt* Givers. CASE 8.

ASSUMPSIT. For that the defendant, in conſideration of a marriage, &c. aſſumed to give him *unum cubiculum, innuendo*, the furniture of a chamber; and for non-performance the action was brought; and upon *non aſſumpſit*, found for the plaintiff, and thirty-ſix pounds given in damages. An *innuendo* muſt have affinity to the matter precedent. 10. Co. 130.

COKE moved in arreſt of judgment, that the breach is not well alledged, in not giving the furniture of a chamber, and the *innuendo* here can have no ſuch intendment; and it is merely a collateral and void matter, as *innuendo* a horſe; for the *innuendo* ought to have ſome affinity with the matter precedent. 1. Term Rep. 70.

GODFREY ſaid the phraſe of the country is ſo, to give a chamber upon the marriage; the meaning is, the furniture, &c.

But THE COURT *contra*. For *primâ facie*, it is merely contrary, except it had been ſo averred in pleading. And it was adjudged for the defendant.

Gravener *againſt* Rake. CASE 9.

Trinity Term, 33. *Eliz. Roll* 611.

THE queſtion was, If an eſtate-tail might be of a copyhold?—GAWDY and CLENCH. It cannot be by the ſtatute, but may be by uſe and cuſtom.—POPHAM and FENNER *contra*. That there may be an eſtate-tail by the ſtatute of copyhold, by *æquitatem rationis*, but it cannot be by cuſtom. Whether a copyhold may be intailed by the ſtatute *de donis* by cuſtom only? Ante, 149. Poſt. 373. 717.

907. Gilb. Ten. 171. Co. Lit. 60. b. 4. Co. 23. See 1. Bac. Abr. 459. 1. Com. Dig. 377.

Hall and Gaven and Others. CASE 10.

INDICTMENT upon the 8. *Hen.* 6. c. 9. Exception was taken, becauſe the ſtatute was recited, *ſi aliquis expulſus ſit et diſſeiſitus*, whereas the ſtatute is *vel diſſeiſitus*. In an indictment, a miſ-recital of the ſtatute on which it is found is fatal.

But GAWDY and FENNER held it not much material; for although words are disjunctive, yet they are always expounded as copulative: for if he be not *expulſus et diſſeiſitus*, action lieth not upon the ſtatute. Ante, 186. 231. Poſt. 355. 393. 697.

Secondly, The ſtatute was recited *vel aliquod feoffament' aut diſcontinuationem*; whereas the ſtatute is *poſt talem ingreſſum aliquod feoffament*. And for this miſ-recital it was held inſufficient. 1. Bulſt. 218. Cro. Jac. 498. Ter. Rep. 581.

2. Hale, 172. 2. Hawk. 353. 356. Dougl. 94. Cowp. 474. 2

HALL and GAVEN and Others.

And it was moved, although the indictment was void for the entry with force; yet it being, that they with others *riotosè et routosè* entered, &c. it ſhould be good for the riot.

CURIA *contra:* for the indictment beginning with the ſtatute, and concluding *contra formam ſtatuti*, this can have no relation to any offence, except upon this ſtatute: and the indictment was awarded inſufficient, and diſcharged.

CASE 11.

Ball *againſt* Roane.

Where ſlander refers to an event, that event muſt be averred to have happened. Ante, 214. Poſt. 342.

ACTION for theſe words: "There was never a robbery committed within forty miles of *Wellingborough*, but thou hadſt "thy part in it." After verdict it was moved in arreſt of judgment, that the action did not lie, becauſe it was not averred there, was any robbery committed within forty miles, &c. for otherwiſe it is no ſlander.—*Et ſic opinio* CUR'; and judgment for the defendant. *Mich.* 36. & 37. *Eliz.* 6. *R. Placito* 11.

CASE 12.

Preſton *againſt* Pinder.

Words actionable. Ante, 6.

ACTION for theſe words: "You have ſought to murder me, "and I can prove it."—Adjudged that it lay.

CASE 13.

Guerdon *againſt* Winterflud.

Words actionable.

ACTION for theſe words: "He is a ſuborner of perjury." After verdict, HARRIS, *ſerjeant*, moved, that the action did not lie; for it is not alledged, that he ſuborned any perſon to commit perjury; and the words of themſelves have no ſenſe, for one cannot ſuborn perjury.

CURIA *contra:* for he cannot be a ſuborner of perjury, but it muſt be neceſſarily intended he did ſuborn ſome perſon to commit perjury, and the words in themſelves are very ſlanderous: wherefore it was adjudged for the plaintiff. And a hundred marks damages being given, THE COURT was moved to mitigate them; but they denied it.

CASE 14.

Pierepoint's Caſe.

Words not actionable. Ante, 192.

ACTION for theſe words: "My maſter hath put me away, "becauſe I would not be a Papiſt; for he will keep no ſervants but Papiſts;" and alledgeth, that he was a juſtice of peace.—Upon demurrer, THE COURT held, that the action did not lie for thoſe words (*a*).

(*a*) *Sed quære*; for by 1. Jac. 1. c. 4. ſ. 22. it is made high treaſon to convert others to popery. 1. Hawk. 67.

CASE 15.

Young *againſt* Watſon.

Eaſter Term, 35. *Eliz. Roll* 41.

Variance. 1. Term Rep. 233. 238. 5. Com. Dig. 25.

DETINUE OF GOODS. The writ was *ad valentiam* twenty pounds: the declaration, *ad valentiam* forty pounds.—It was adjudged error, and the judgment reverſed.

And in another writ of error between the ſame parties, *Paſch.* 35. *Eliz. Rot* 42.

Firſt

FIRST ERROR assigned was, That there were not fifteen days between the *teste* and the return of the *venire facias*.—But it was held, that this was clearly helped by the ſtatute of jeofails. YOUNG *againſt* WATSON.

SECOND ERROR, That the *venire facias* had no return; for the ſtatute did not help non-returns, but miſ-returns.—And this was held error; for the jury appeared without warrant. And for this cauſe it was reverſed. Error in *venire facias*. Poſt. 310.

Gore and Uxor *againſt* Perdue. CASE 16.

Eaſter Term, 34. Eliz. Roll 234.

ERROR upon a judgment in dower, where the parties were at iſſue; and afterwards the defendants made default; whereupon a *petit cape* was awarded, and judgment given by default. Error aſſigned, that the tenant was within age at the time of the judgment. In dower, the infancy of one defendant is no ground to reverſe the judgment.

THE COURT held it no error, eſpecially being after appearance, for he cannot ſave his default by non ſummons. *Vide* 7. *Edw.* 2. & 17. *Edw.* 2. "*Saver de Default.*" Poſt. 351. 557. 567. Cro. Jac. 111. 2. Cr. 465.

Moor, 465. 2. Brownl. 118. 2. Leon. 59. 3. Bac. Ab. 159. Poſt. 323. Ante, 51.

Tiblethorpe *againſt* Hunt. CASE 17.

Hilary Term, 35. Eliz. Roll 557.

DEBT on a bond of 14l. for payment of 7l. The defendant pleaded payment at the day, and upon this they were at iſſue. The jury found payment of fifty ſhillings, parcel of it, and that the defendant then delivered to the plaintiff certain hats to the value of the reſidue, which he accepted.—And it was adjudged againſt the defendant; for this is no payment; but he might have pleaded this matter ſpecially, and then the acceptance of the plaintiff had been a bar. A payment in *goods* inſtead of *money* is no diſcharge of a bond, unleſs the obligee's acceptance is ſpecially pleaded. Ante, 304.

The Queen *againſt* Ingerſall. CASE 18.

ATTAINT. The caſe upon ſpecial verdict was, *Brooks* had ſued an information for the queen and himſelf againſt the defendant, upon the ſtatute, for buying of cattle out of fair or market, &c. and ſuppoſeth he bought the cattle of one *Pearepoint et aliis ignotis*. The defendant pleaded not guilty, and the jury find for the defendant. A writ of attaint lies by the queen alone on a verdict for the defendant in a *qui tam* information; but though the *grand jury* find that a falſe fact was given in evidence, yet the *petty jury* ſhall not be attainted, if ſuch fact was not material to the point in iſſue. Ante, 140.

Upon this the queen alone, for ſhe cannot join with the party, brought an attaint; and the grand jury in the queen's bench, *Paſch.* 35. *Eliz.* find this ſpecial verdict, *ſcil.* "That it was given "in evidence to the petit jury by one *Whitworth*, that the defen- "dant out of fair and market did buy forty cattle, which were "the cattle of *Pearepoint*; but they found, that in truth the cattle "were bought of *Whitworth*, as the cattle of *Whitworth*; and that it "was not given in evidence that they were bought of *Whitworth*, "as the cattle of *Whitworth*: and if upon the whole matter, &c."

And it was argued by COKE and MANN *for the queen*, that upon this matter the jury is to be attainted: for here the point in iſſue is found, that they were bought out of fair or market; and it is not material if they were bought of him that is named in the information, or of others; and then the petit jury was to find him

1. Ro. Ab. 288. 4. Leon. 46. 2. Jones, 14. Co. Lit. 6. 5. Mod. 76. 118.

294. 355. Vaugh. 153. 11. Co. 6. 10. Co. 119. Carth. 362. Ld. Ray. 59. 470. Salk. 205. Skin. 595. 12. Mod. 85. 3. Inſt. 164. 3. Bl. Com. 403, 404.

The QUEEN *against* INGERSALL.

guilty; and for that cited 38. *Hen.* 8. *Bro.* "*Iſſues*" 81. and a Caſe in the exchequer, 13. *Eliz.* in an information for buying of corn of *J. S contra formam ſtatuti*; and the jury find it was bought of *J. B.* and adjudged againſt the defendant.—And ſo THE JUSTICES did agree here, that the buying of the cattle of any other perſon is ſufficient to maintain the information. And although it be matter of law, yet the jury finding the contrary to it, an attaint lieth; as was *Pleadal's Caſe*, 10. *Eliz.* and 5. *Eliz. Dyer*, 219.

It was here ſaid by THE JUSTICES, that if the Judge delivers the law to the petit jury, and they find accordingly, although he miſtakes the law, the jury ſhall not be attainted (*a*).—And it was moved, if an attaint lieth where verdict paſſeth againſt the queen upon an information. And THE COURT held it did.

(*a*) Ld. Ray. 370.

But in the principal caſe THE COURT held, that there was no ſufficient matter to attaint the petit jury. For it appeareth, that the evidence given to them was falſe in part; and although the falſity was in a point not material, *ſcil.* that the cattle were the goods of *Pearepoint*, whereas they were the goods of *Whitworth*; yet by reaſon of this falſity, the jury need not give him credit in any other part; and ſo they had no cauſe to find their verdict upon this oath againſt the defendant. And here, though it was found he ſold them *ut averia Whitworth*, yet this is an expreſs averment, that they were the goods of *Whitworth*; as in pleading it is alledged, that land deſcend to one *ut filio et hæredi*.

Cases 19.

Hanger *againſt* Fry.

On a ſuggeſtion that a defendant has other lands in the ſame county, a ſecond *elegit* may be awarded, on the return of the firſt *elegit*. Ante, 160.

THE caſe upon ſpecial verdict was, That the plaintiff recovered in debt againſt *H. Fry*, and ſued a writ of *elegit*; and the ſheriff did deliver to him ſome lands of the ſaid *H. Fry* in extent; *ſuper quo* the plaintiff came in court, and ſurmiſeth that the ſaid *H. Fry* had other lands in the ſame county, and prayed another *elegit*, and had it; and by virtue of this ſecond writ, the lands in queſtion were delivered.

Moor, 341. 1. Roll. Abr. 304. Gilb. Ex. 53. 1. Lut. 435. Dougl. 231.

The queſtion was, If this ſecond extent was good? and if not, whether it is void or voidable? 18. *Edw.* 2. "*Execution*," 140. 22. *Edw.* 3. *pl.* 14. 29. *Hen.* 8.

POPHAM, *Chief Juſtice*. If it doth appear that the plaintiff had taken the firſt land upon the delivery of the ſheriff, and accepted it, then he cannot afterwards take a new extent; and if he doth, it is wholly void, and not merely voidable or erroneous; for then the record is ended, the attornies of both parties are out of court, and it is as a writ without original, which is wholly void. But here it is found, *ſuper quo* he came and prayed a new extent; and this ſhall be intended the firſt day of the extent returned, and then it is reaſon that he may waive it, and pray a new extent; for he never accepted of the firſt; and ſo are the books, that if the demandant in dower accepted the land aſſigned by the ſheriff, ſhe cannot in another term pray a new execution.

FENNER and CLENCH were of the ſame opinion; and ſaid, ſo is the courſe in the common pleas to grant a new *elegit*, if the party pray it upon ſuch ſurmiſe.—And afterwards it was adjudged, that the new extent was good.

Stainer

Stainer *againſt* James.

CASE 20.

IT was moved in arreſt of judgment, that the name of the ſheriff was not to the *diſtringas*, nor to the *tales* awarded upon it; and it was tried by *niſi prius*. And it was ſaid, that the name of the ſheriff was not of neceſſity till the ſtatute of *York*, nor was uſed or appointed; and by that ſtatute, the ſheriff is to forfeit a penalty, if he doth not return his name upon it; but this doth not make the return ill, and it is helped by the 32. *Hen.* 8. c. 30. which helps inſufficient returns; and no writ returned.

If the ſheriff's name be omitted in the proceſs to the jurors, it is a cauſe to ſtay the judgment. Ante, 308. Poſt. 466. 509. 704.

CURIA *contra:* for of neceſſity the name of the ſheriff is to be to the return, otherwiſe it appeareth not by what warrant it came in; and otherwiſe any man without the ſheriff might return writs, which would be a great inconvenience: and the ſtatute doth aid only inſufficient returns, or when the writ cannot be found; ſo it may be intended it is embezzled. But here it appeareth, and that it was never returned; wherefore it cannot be good. And it was ſaid, it was ſo ruled in the common pleas, 35. *Eliz. Walklie's Caſe*; and alſo in this court between *Mark and Lancaſter*. And for this cauſe the judgment was ſtayed.

Moor, 65. 587. Cro. Jac. 188. Cro. Car. 189.

CASE 21.

Childe *againſt* Towers.

ASSUMPSIT in the county of *Warwick*, *Warwick* being in the margent. And declareth, That the defendant was poſſeſſed of a term for years at *Norton*, in the county of *Northampton*; *et poſtea*, *apud Stonely in com' prædict'* aſſumed, &c.

A *relative* ſhall be referred to its laſt *antecedent*. Ante, 101. Poſt. 324. 436.

Upon *non aſſumpſit* the *venire facias* was awarded *de Stonely in com' War'*, and trial upon it.

And it was held a miſ-trial by all THE COURT; for *apud Stonely in com. prædict.* ſhall be intended in *com. North.* which is laſt named, and not to *Warwick*, which is in the margent.

36. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Thomas Egerton, *Knt. Attorney General.*
Sir Edward Coke, *Knt. Solicitor General.*

CASE 1.

Thornaigh *againſt* Diſney.

The *addition* of the plaintiff's name is not material in a declaration in debt on bond.

DEBT upon an obligation of four hundred pounds. The defendant demandeth judgment of the bill, for that the plaintiff in the obligation was named *J. Thornaigh, de Fenton in com' Nott. arm'.* and in the declaration he was named *Jo. Tho. arm'*; ſo "*de Fenton in com' Nott.*" were left out; and for this variance demands judgment.

Upon motion, without argument it was ruled, that the defendant ſhould anſwer over; for this is no variance to abate the bill: when he is well named in his proper name and ſirname, the addition is not material; otherwiſe, if it were of the part of the defendant.

COKE, *Solicitor General*, who pleaded it, ſaid, That he did it only to gain time, becauſe it was a matter of great extremity. *Vide* 3. *Hen.* 6. *pl.* 23. 5. *Edw.* 3. *pl.* 230.

CASE 2.

Forteſcue *againſt* Hext.

Hilary Term, 35. *Eliz. Roll* 35.

Words actionable.

ACTION for theſe words: Thou art a witch, an enchanter, a "necromancer, and a ſorcerer, and thereby waſt the cauſe of "the death of my huſband."—Upon demurrer, and reading the record, without any argument adjudged, that the action lay. For by POPHAM, there cannot be more heinous words, and by them the party was to ſuffer corporal puniſhment.

NOTA. The ſame Term and Roll, between the ſame parties, action for theſe words: "He is a witch, and bewitched my huſ-"band to death; FOR he made his picture in wax, and roaſted it "every day by the fire, until he roaſted my huſband to death."

Upon demurrer, HARRIS, *ſerjeant*, moved, That theſe words will not maintain an action; for when ſhe ſhewed the cauſe of the words, it appeareth to be a vain and fond conceit, and then no cauſe to call him a witch; as to ſay, "Thou art a thief, *for* thou "haſt ſtolen my evidences."

But THE COURT held the words very heinous and actionable; and it was ſo adjudged.

See the ſtatutes 1. Jac. 1. c. 12. and 9. Geo. 2. c. 5. 1. Hawk. P. C. 8.

Bleverhaſſett

Bleverhaſſett *againſt* Baſpoole.

Case 3.

ACTION for words, for that the plaintiff was a juſtice of the peace, and the defendant was indicted of felony, and pleaded to it not guilty. The defendant ſaid theſe words, "*Mr. Haſſett* did "ſeek my life, and offered ten ſhillings to the under-ſheriff to "impanel a ſpecial jury that might find me guilty of the felony."— And it was adjudged that the words were very ſlanderous, being ſpoken of a juſtice of peace: and the plaintiff had judgment.

Words actionable.

Doctor Ford et Uxor *againſt* Hollingborough.

Case 4.

Trinity Term, 35. Eliz. Roll 361.

DEBT upon an obligation brought by the plaintiff and his wife, executrix of *Dr. Drury*. The condition was, That whereas *Dr. Drury* had let land to the defendant for ſeventeen years; if the defendant or his executors do pay to *Dorothy Goldingham* ten pounds yearly, during the ſeventeen years, if he or his aſſigns, and all other perſons that ſhall claim the ſaid lands under him, ſhall or may ſo long occupy the ſame lands, &c. that then, &c. The defendant pleaded, that within five years, &c. he ſurrendered the ſaid lands to *Dr. Drury*, and that all times before he paid the ten pounds: and upon this it was demurred in law.

A bond to pay an annuity to *A.* if he or his aſſigns ſhall or may occupy the lands let to him by *B.* is forfeited by non-payment to *A.* altho' the obligor has ſurrendered the lands to *B.*

COKE argued *for the defendant*, for that his eſtate was ended by the act and aſſent of the obligee himſelf, who was to take advantage of it, and therefore the action did not lie.—TANFIELD *contra*.

Hob. 103. Hetl. 54. Yelv. 23. Poph. 39. Owen, 104. Moor, 597. 1. Wood's Con. 315. Dougl. 384. 2. Term Rep. 366.

All THE COURT held that the action did lie; for the condition was collateral to pay money to a ſtranger, ſo long as he or his aſſignees might enjoy the land. Here, though he ſurrendered, yet to a ſtranger his eſtate is not determined, but is *in eſſe*: and this is an act to be done by him to a ſtranger, which the obligee ſhall not eſtop him to do; and the obligee who had the reverſion, and who is in by the ſurrender, is as to a ſtranger in by him, and under his title, and occupied as his aſſignee. Alſo the words are, if he ſhall or may enjoy, &c. and here he might have enjoyed it; and therefore during the time he might have enjoyed it, he is to pay it.

But POPHAM ſaid, if the condition had been, if he or his aſſignees, or thoſe who ſhould occupy the lands, ſhould pay the money, and after he had ſurrendered to the obligee, and he did not pay it, the obligation had not been forfeited; for the obligee in that caſe was the party that was to pay it, and he ſhould not take advantage of the non-payment, as 35. *Hen.* 6. "*Bar.*"— Wherefore it was adjudged for the plaintiff.

Clerk *againſt* Day.

Case 5.

Hilary Term, 35. Eliz. Roll 467.

THE caſe upon ſpecial verdict was, *Joan Marſh* deviſed certain land to *Roſe* her daughter for life; and, "if ſhe marry after "my death, and have *heir* of her body, then I will that *the heir*,

A deviſe to *A.* for life, and if ſhe marry after my deceaſe and

have *heir* of her body, then the heir ſhall have the land after her death.—*Qu.* If this paſſes an eſtate in tail, or for life? S. C. Owen, 148. Moor, 593. 1. Roll. 839. 2. Roll. 417. and ſee 1. Str. 15. L. Ray. 205. Fitzg. 24. 1. Burr. 42. 45. 3. Com. Dig. 26. Powel on Dev. 363. 2. Strange, 798. 804.

"after

CLERK *against* DAY.

" after my daughter's death, ſhall have the land, and to the heirs " of their body begotten; and if my daughter die without iſſue of " her body begotten, then *Philip Taylor* ſhall have it to him and " his heirs." *Joan Marſh* died. *Roſe* married *Silly*, and had iſſue.

The queſtion was, If *Roſe* had an eſtate in tail, or for life only?

Firſt, It was agreed by all THE JUSTICES, that a deviſe to one and *the heir* of his body, is an eſtate tail, and ſhall go to all the heirs of her body; for " *heir*" is *nomen collectivum* (*a*), and one can have but one heir at one time, and this ſhall go from heir to heir.

(*a*) 2 Roll. Abr. 253. 1. Roll. Ab. 832. K. pl. 1. 626. 2. Godb. 155. T. Jones, 111. Rob. Gavelk. 95, 96. Burr. 4. part v. pl. 38. Vin. Ab. "Deviſe" U. a. pl. 13. and "Parols" H. See 1. Strange, 14.

But GAWDY and FENNER held, that *Roſe* had but an eſtate for life; for ſo it is limited by expreſs words, that ſhe ſhall have for life; and then her heir ſhall take as a purchaſer, and it ſhall not execute in *Roſe* (*b*).

(*b*) Poſt. 316. 453. 1. Co. 66. Raym. 333. Keb. 18. 99. 176. Godb. 155. 2. Sid. 51. 2. Roll. Rep. 256. Plowd. 89. b. Palm. 404. Hetl. 76. Styles, 250. 1. Roll. 832. 2. Roll. 253. 417. 1. Bulſt. 222. Moor, 583. Owen, 148. Co. Lit. 8. Cro. Jac. 145. Vide 1. Peere Will. 57, 58. 88. 2. Burr. 1110. 1. Salk. 242.

POPHAM, *Chief Juſtice*, *contra*. For the eſtate is limited to the anceſtor, and after limited to the heir, and ſhall execute in the anceſtor; eſpecially the words being, " if ſhe hath any heirs," and therefore intended that any heir ſhall have it. *Et adjournat'* (*c*).

(*c*) No judgment is entered on the roll, yet *Moor*, 593. ſays the opinion of the Court was given; and *Hale* cites it as ſuch in the caſe of *The King v. Melleng*, 1. *Ven.* 214. 225.—See 2. Stra. 804. Fitzgibbon, 24.

In the caſe of *Shaw v. Weigh*, B. R. Mich. 7. Geo. 1. LORD RAYMOND inſpected the roll of this caſe (the true name of which is *Cheat v. Day*. See 2. Stra. 804.) and that the deviſe was: " *If ſhe marry after my death, and have* ANY *heir of her* " *body then* LAWFULLY BEGOTTEN, *I* " *will that* THAT *heir after my daughter's* " *death ſhall have the land, &c. &c.*" *L. C. B.* PARKER'S *MSS.*

CASE 6.

Waring *againſt* Whale.

Eaſter Term, 34. *Eliz.* *Roll* 132.

If it does not appear by what authority a fine is levied, it is void.

ERROR to reverſe a fine in *Shrewſbury*, levied before the bailiffs there.—Firſt Error. It did not appear that they had any authority to take fines, and they cannot have it by preſcription, or by general words in the king's grant.—Second, It is levied without any covenant.—Third, It is *de meſſuagio ſive tenemento*, which is in the disjunctive, and incertain (*a*).

(*a*) See the caſe of Auſtin and Steen v. Courtney, ante, 116, 117.

CURIA. This fine is void, for that it appeareth not by what authority the fine was levied; for it is in derogation of the crown, and profits of the crown, *pro licentiâ concordandi*. And *Poſch.* 36. *Eliz.* the fine was reverſed.

CASE 7.

Ka. Geanes *againſt* Portman.

The conſent of one joint-tenant that the other ſhall occupy and take the profits of the land to his own uſe, is a leaſe at will.

THE caſe upon ſpecial verdict was, *J. Geanes*, the huſband of the plaintiff, and *T. G.* were joint-tenants for life, the reverſion to *H. Portman*. *J. Geanes*, by the aſſent of *T. G.* occupied the land alone, and took the profits alone to his own uſe, and ſowed the land to his own uſe, and made the plaintiff his executor, and died: and afterwards *T. G.* made his wife executrix, and died; ſhe ſold the corn to the defendant, who took it; and the plaintiff brought treſpaſs.

Upon

Upon motion, all THE COURT agreed for the plaintiff; for by this aſſent, that *J. G.* alone ſhould occupy the land, and take the profits to his own uſe, this doth amount to a leaſe at will, which one joint-tenant may make to the other; ſo the plaintiff hath good title: but if he had ſaid to his companion, "I will not "occupy it," this had not been material, for he doth not by this aſſent that his companion ſhall have all, nor gave anything by this to his companion.

GRANES *againſt* PORTMAN.

Co. Lit. 186. a.

Pratt *againſt* Stocke.

CASE 8.

ASSUMPSIT by an adminiſtrator. And counts of an adminiſtration granted to him by *Tho. Tayler*, bachelor of law, commiſſary to the biſhop of *London*. The defendant pleads the 37. *Hen.* 8. c. 17. intending that none by that ſtatute can be a commiſſary but a *doctor of law*. Alſo that ſince the laſt continuance (which was from *quindena Martini* to *die Lunæ poſt oct. Hillarii*) the biſhop of *London* granted adminiſtration to him by his letters bearing date 27. *January*. Upon this it was demurred. Two points were moved.—Firſt, If a bachelor of law may be a commiſſary ſince the 37. *Hen.* 8. c. 17.?—Second, If adminiſtration be committed *pendente billâ*, if the will abateth?—But as to that, it was held clearly that the plea was miſ-pleaded; for this is pleaded after the *darrein continuance*, where it appeareth to be after his plea pleaded. But THE COURT held for the plaintiff.

A perſon may be commiſſary to a biſhop tho' he is not a doctor of laws.

Jones, 264. Pop. 37. Cro. Car. 258. See 13. Car. 2. c. 2.

POPHAM, *Juſtice*, ſaid, that adminiſtration and probate of wills was by the common law, which any might do; and the 37. *Hen.* 8. c. 17. is in the affirmative, that doctors of the civil law may be commiſſaries though they are married; but it is not reſtrictive that no other may be commiſſaries, and therefore taketh not away the liberty at common law. And if a bachelor at law cannot be a commiſſary, yet acts done by him are not void till they be avoided by ſentence; as if a layman be preſented, inſtituted, and inducted, this is not void.—And to the ſecond, they hold that if letters of adminiſtration be granted to one, and after are granted to another, by this the firſt are not avoided, except by judicial ſentence; but by the miſ-pleading this cometh not in queſtion.—And the plaintiff had judgment.

If adminiſtration be granted to one and after to another, the firſt is not *void*, but *voidable* only.

Poſt. 457. Peer. Will. 43. 767. Cowp. 140. Cro. Jac. 258, 259. Ante, 283.

Buckland *againſt* Brook.

Hilary Term, 35. *Eliz. Roll* 360.

CASE 9.

ASSUMPSIT againſt the defendant, as adminiſtrator, *W. Brooke* upon an *indebitatus aſſumpſit*. The action was brought *Hill.* 35. The defendant pleads, that the inteſtate ſuch a day made an obligation to *J. S.* of forty pounds for payment of twenty pounds at *Michaelmas*, which ſhould be *Ann. Dom.* 1593; and that he hath fully adminiſtered all the goods of the inteſtate which were the inteſtate's at the time of his death, except to ſatisfy the ſaid twenty pounds: *et ſic nihil habet nec tempore exhibitionis billæ prædict' habuit*, &c. and upon this it was demurred.

An adminiſtrator ſhall not be obliged to pay ſimple contract debts while bond debts remain unſatisfied, although the bonds are not due; and *plene adm.* of the goods which were the inteſtate's *at the time* of his death, is good.

FOSTER, *for the plaintiff*. That this debt upon contract is to be ſatisfied before the debt upon the obligation, which is not yet

Poſt. 575. 822. Went. 141. 3. Lev. 57. Cro. Car. 363. B. R. H. 228. 1. Salk. 1. 296. 1. Term Rep. 690.

due;

BUCKLAND against BROOK.

due; for by this means he may defeat all contracts by a debt upon bond which shall be due one hundred years after. Also the plea is not good, for that he saith that he hath no goods which were the intestate's at the time of his death; for he may have goods that were not the intestate's at the time of his death; and so is 7. *Hen.* 4. *pl.* 39. Also he ought to answer to the time since the bill exhibited; for he ought to say, he had not at the time of the bill exhibited, or at any time *postea*; and *non habet*, &c. without answering to the mean time is not good.

CURIA *contra*. The matter of the plea is good, for debts upon bond are to be paid before debts by contract; and this proved by the declaration in these actions, that he hath sufficient to satisfy all other debts. And to the first exception, the plea is good to a common intent; and if the truth be as the plaintiff supposeth, he is to shew it; and the YEAR BOOK of 7. *Hen.* 4. is not law in that point.

THE COURT doubted as to the last exception; but DANIEL said it was but of form, and it was not shewed for cause of demurrer. *Et adjournatur.*

CASE 10.

Cordal's Case.

A devise of lands to executors for the payment of debts; and when they are paid *A.* for life, remainder in tail; the executors have but a chattel and no freehold; and the estate tail remains unexecuted and disjoined during the life of *A.* S. C. 8. Co. 96.

NOTA. COKE, *Attorney General*, shewed to me a resolution of GAWDY and ANDERSON in a case referred to them by the queen's commandment, in which two points were resolved; where a devise was to two persons of lands to hold for payment of the legacies in a will, and the debts of the testator; and afterwards to *Ed. Cordal* his brother for life; remainder to his first son in tail, and so to the second; the remainder to the heirs of the body of *Ed. Cordal.*

First, It was resolved, that this is no freehold in the two persons, but only a term for years, although it cannot be said for any certain number of years; for the profits are not certain, nor the debts; yet it is a chattel, and *quasi* a term, as a devise during the minority of *J. S.* or land extended for debt; and this is in favour of wills: but otherwise it is of such a limitation in a deed, for there it is a freehold conditional (*a*).

(*a*) Co. Lit. 42. a. 3. Lev. 314. 347. 1. Jones, 25. Ray 136. 1. Sid. 224. 2. Bulst. 273. Allen, 47. 1. Lev. 100. 1. Roll. Abr. 829. Fearne, 271. 1. Stra. 16. Swinb. 31.

Second, It was resolved, that the estate tail was not executed for the possibility of the mean estate that might interpose, and therefore it was always disjoined during the life of *Ed. Cordal*; so that of that estate his wife could not be endowed. And this was resolved upon conference (*b*).

(*b*) Ante, 314. Co. Lit. 28. a. 2. Saun. 383. 386. B. R. H. 13. 3. Lev. 447.—See also Cas. tem. Hard. 17. where Lord Hardwick says, that in 2. Saund. 336. Cordall's case is denied to be law.—Sed vide Mr. Hargrave's note [3] Co. Lit. 239 b. 3. Com. Dig. 230. Fearne's Cont. Rem. 271. Gilbert's Law of Devises, 71. 2. Atk. 246.

Easter

Eaſter Term,

36. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* *Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke (*a*), *Knt.* *Attorney General.*
Solicitor General.

(*a*) Appointed 10. April, 1593.

A Call of Serjeants.

NOTA. In this Term there were ten Serjeants made, who appeared in chancery *tres ſeptim. Paſch.* VIZ. *John Heal*, of the INNER TEMPLE; of GRAY'S-INN, *William Daniel* and *John Spurling*; of LINCOLN'S-INN, *George Kingſmill*, *Peter Warberton*, *Richard Braithwaite*, and *Thomas Fleming*; of the MIDDLE-TEMPLE, *Richard Lewker*, *John Savill*, and *David Williams*. All of them except *Daniel* and *Kingſmill* had their writs in *Michaelmas Term*, returnable in *Eaſter Term*, as the Juſtices ſaid the order was to have one Term between the writ and the return; but *Daniel* and *Kingſmill* had their writs in the vacation between *Hilary* and *Eaſter* Term; yet they all appeared together, and had their antiquities as they were.

Godfry *againſt* More.

CASE 1.

Words ſpoken maliciouſly ſhall be taken ſtrongly againſt the ſpeaker of them.

2. Bl. Rep. 960.

ACTION for theſe words: "Thou haſt killed a man at *Mal-*"*den* in *Eſſex*." Upon not guilty, it was found for the plaintiff; and moved in arreſt of judgment, that the words were not actionable, for they were too general; for it may be he killed one in his defence, or he killed a thief that aſſaulted him in the high-way, or was an officer, and in arreſting killed him, &c.— And of this opinion at the firſt was GAWDY.- But it being moved again, all THE COURT held, that the words being alledged to be ſpoken maliciouſly, ſhall be taken moſt ſtrongly againſt him that ſpoke them: and it was adjudged for the plaintiff.

Tryor *againſt* Beſtney Betts.

CASE 2.

To pay the *vicar* 6s. 8d. a year, and to paſture a horſe, is a good *modus* for tithe-hay; and the *parſon* ſhall be prohibited from ſuing for the tithes in ſpecie.

Ante, 71.

Dougl. 204.

PROHIBITION for ſuing for tithe-hay in *Chartres*. And ſurmiſed, that the defendant is parſon *impariſonée* of the parſonage of *Chartres*; and that there was a vicar of *Chartres*, of which the defendant was patron, &c. and that time out of mind, &c. he had uſed to pay to the ſaid vicar, in full ſatisfaction of the tithes of hay of the place, where, &c. ſix ſhillings and eightpence *per annum*, and the paſturing of a horſe in the ſame place.—GODFREY moved that it was no good ſurmiſe, for by it the right of tithes came in queſtion, to whom they were to be paid, to the parſon or vicar? as 31. *Hen.* 6. and 6. *Edw.* 4. are, and *Buſhe's Caſe* in this court.—GAWDY and POPHAM. Where the right of tithes is to come in queſtion, this ſhall be tried in the court chriſtian; and it is no plea he hath uſed to pay the tithes to the vicar, for then he confeſſeth he ought to pay tithes; but the queſtion was, Who ſhould have them? And this ſhall be tried in the court chriſtian; and that was the reaſon in *Buſhe's Caſe*; for there he pretended he was to pay tithes in *ſpecie*, but here it is only a *modus decimandi*; which

TRYOR *againſt* BESTNEY BETTS.

which though he pleads it to be to the vicar in diſcharge of tithes, yet it is good; for otherwiſe there will be a great miſchief; for the ſpiritual court will not allow a plea of *modus decimandi*, but only of payment of tithes in kind; and they will not allow him to plead the intereſt of the vicar, nor payment to him for diſcharge, but he ought to come in *pro intereſſe:* and if he will not come, but collude with the parſon, to charge the pariſhioners to pay tithes in *ſpecie*, he ſhall be charged to pay other tithes than he hath uſed; and therefore the common law ſhall aid him, and eſpecially as this caſe is, as it was moved by TANFIELD, that the defendant is patron of the vicarage, and the vicar in conſideration of theſe tithes diſchargeth him of all ſpiritual care and charge.—FENNER and CLENCH inclined to this opinion. *Et adjournatur.*

CASE 4.

Grills *againſt* Ridgeway.

In what caſes a *repleader* may be awarded.
Ante, 62.
Poſt. 439. 883.
1. Saund. 128.
Ray. 458.
Cro. Jac. 678.
1. Salk. 173.
2. Salk. 579.
Dougl. 396, 747.

THE caſe 3. *Co.* 52. b.—GAWDY ſaid, it is without queſtion that a repleader may well be after a demurrer; but that is when the pleading is inſufficient of both parties.—POPHAM. If it be inſufficient in matter, ſo that by it the action is confeſſed, and the plaintiff reply, and a demurrer upon it, yet judgment ſhall be given againſt the defendant; but where the bar is inſufficient not in matter, but in form (as for want of a traverſe), and a replication is to it, which is ill, and a demurrer upon it, there ſhall be repleader.—Afterwards THE JUSTICES moved the parties to diſcontinue the action, and to commence again; and ſo they did.

The caſe referred to in *Lord Coke's Reports* was an action of debt againſt the ſheriff of Devon for an eſcape. The declaration ſtated, that the ſheriff had taken the priſoner in execution at *Stoke-Cannon* in the ſaid county, and had afterwards ſuffered him to eſcape in the *Ward of Cheap, London*. The defendant pleaded, and confeſſed that the priſoner was taken at *Stoke-Cannon*; and eſcaped; upon which he *(the ſheriff)* made freſh ſuit at *Stoke-Cannon* aforeſaid, and by virtue of the ſaid execution, and before action brought, retook the priſoner. The plaintiff replies by way of proteſtation, that the defendant did not make *freſh ſuit*; that after the priſoner's eſcape, and before he was retaken, he was one whole day and night at the *Ward of Cheap, in London*, out of the ſight of the defendant To this replication the defendant demurred. And it was agreed, that the *bar* was inſufficient in juſtifying the re-taking at *Stoke-Cannon*, without anſwering the eſcape at *London*; and that if the plaintiff had demurred, he ſhould have had judgment; but that as he had choſen to rely upon the proteſtation that the priſoner was *out of ſight*, and had not denied the *freſh ſuit*, there did not appear upon the record any cauſe of action.

CASE 5.

Rowland Hargthorpe *againſt* Margery Milforth and Anth. Milforth.

An executor ſhall only be charged to the amount of the aſſets which come to his hands, and not for the wrong or *devaſtavit* of his companion.
Ante, 216.
Dyer, 210.
Godol. 134.
Went. 100.
Salk. 318.

DEBT againſt the defendants as executors. They pleaded *fully adminiſtered*, and ſo nothing in their hands. Upon iſſue the jury found, that they two, and one *Agnes Milforth* their mother, were made executors; and that *Agnes* had adminiſtered, and waſted goods to the value of ſix hundred pounds, and that the defendants had not of the goods of the teſtator but to the value of ſixteen pounds; and that *Agnes* was dead: and, If they ſhould be charged by this *devaſtavit* of their co-executor, or only charged for the ſixteen pounds? was the queſtion.—THE COURT held clearly, that one executor ſhall not be charged by the *devaſtavit* made by his companion; for the act of one executor ſhall charge the other no further than the goods of the teſtator in his hands amount unto,

1. Ch. Ca. 57. Cowp. 289. 2. Brown's Caſ. Ch. 114.

but

but not to charge him of his own goods; for it was the folly of the teſtator to put ſuch truſt in one that would do ſuch acts to his diſadvantage; but the acts of one ſhall not hurt the other, for their own goods: as if one executor will confeſs an action, this ſhall bind the other: ſo if he will releaſe an action, or give away all the goods of the teſtator, this ſhall bind his companion. *Vide* 3. & 4. *El. Dyer*, 210. 21. *Hen.* 6. *pl.* 46. Where they ſhall be charged of the goods of the teſtator, the non-ſuit, releaſe, or other act of one ſhall bind the other; but not if they ſhall be charged of their own goods. 11. *Hen.* 4. 69. Where both do waſte the goods, execution ſhall be againſt both of their proper goods. HARGTHORPE *againſt* MILFORTH.

It was then moved, if judgment ſhall be againſt them of the whole debt, or of ſo much as is found in their hands?—And THE COURT held clearly, that judgment ſhall be of the whole debt, but that execution ſhall be only for the ſixteen pounds which is found to be in their hands; for otherwiſe the plaintiff ſhall be barred of the reſidue, which is inconvenient. *Vide* 46. *Edw.* 3. *pl.* 9. 7. *Edw.* 4. *pl.* 9. 33. *Hen.* 6. *pl.* 24. 34. *Hen.* 6. *pl.* 24. On aſſets found judgment ſhall be for the whole debt: but the execution ſhall be only for the aſſets found. Poſt. 592.

And afterwards, at the end of the Term, all the prothonotaries of the common pleas certified that their courſe was not to enter judgment of the whole debt, but only that he ſhall recover ſo much as was found in their hands; and thereupon THE JUSTICES would adviſe of their judgment in that point: but for the firſt point they were all reſolved *ut ſupra.* Cro. Car. 167. 373. 1. Roll. Ab 929. 8. Co. 134. Moor, 246.

Fulſhaw *againſt* Aſcue.

CASE 5.

ERROR to reverſe a judgment in the common pleas. For that *Aſcue* brought an *audita querela* to avoid a ſtatute acknowledged before the mayor of *Lincoln*, becauſe it was ſealed with a ſeal of one piece, where the 13. *Eliz.* c. 1. *de mercatoribus* (*a*) doth appoint it to be ſealed with a ſeal of two pieces; whereof the mayor ſhall keep one, and the clerk appointed for this purpoſe the other. The defendant pleaded it was ſealed with a ſeal of two pieces, according to the ſtatute; and thereupon at the *niſi prius* at the city of *Lincoln*, it was found for the plaintiff in the *audita querela:* and thereupon, in the common pleas, it was adjudged, that *ſtatutum prædictum in formâ prædict. recognitum penitus vacuum foret, et pro nullo habeatur.* Upon this error was brought.—Firſt, For that the trial in this caſe was not good; for the iſſue was not to be tried *per pais*, but by the certificate of the mayor; and all the other matters were alledged as before in the common pleas.—Second, That this judgment *quòd penitus evacuetur* is erroneous, for though it be void as a ſtatute, yet it is good as an obligation.—But the judgment was affirmed: for as to the trial, it was a matter in fact, triable by the county; and if it be not a ſtatute, it is no obligation: but being diſcharged as a ſtatute, it hath loſt its force in all reſpects; and that the ſole means to avoid it is by an *audita querela*; for error lieth where the ſtatute is good, but the execution is erroneouſly ſued upon it, as 17. *Aſſ.* (*b*). And the judgment was affirmed. *Vide the judgment in C. B. Paſch.* 33. *Placito* 4. *page* 233. Whether a ſtatute merchant legally ſealed ſhall be tried upon *audita querela per pais*; and if bad as a ſtatute, it is void as an obligation. Ante, 233. Poſt. 355. 810.

(*a*) Owen, 142. Dyer, 35. 1. Leon. 233. 4. Co. 30. Carth. 282. 4. Mod. 314. Salk. 262.

(*b*) See 2. Bac. Abr. 333. and 8. Geo. 1. c. 25.

Codwell

CASE 7.

Codwell *againſt* Parker.

Michaelmas Term, 33. & 34. *Eliz. Roll* 419.

It is a miſ-trial if a juror be returned by one chriſtian name and ſworn by another.

APPEAL DE MAIHEM. The parties were at iſſue, and one juror was returned by the name of *Palus Cheale*; but in the *diſtringas*, and panel annexed, he was named *Paulus Cheale*, and by that name ſwórn. This matter was alledged in arreſt of judgment; and it was held no trial, for it was only by eleven.

The cauſe of awarding a *venire facias de novo* need not be ſpecially entered on the record. Ante, 57.

FOR that cauſe a *venire facias de novo* was awarded. *Vide* 5. *Co.* 42. b. and the iſſue was tried. It was moved in arreſt of judgment, for that the record was entered, that in the firſt *venire facias* one *Palus Cheale* was returned, and in the *diſtringas* awarded upon it, *Palus Cheale* was left out, and *Paulus Cheale* put in, *ſuper quo conſideratum eſt per Cur.* that a *venire facias de novo* ſhall be awarded; but it is not mentioned that *Paulus Cheale* was ſworn, and trial had; wherefore no cauſe here appeareth to award a *venire facias de novo*; and ſo this is miſ-awarded.—But THE COURT held, although this be the cauſe ſet down in the record, yet it ſhall be intended that there is a good cauſe apparent upon the whole record together to award a *venire facias de novo*; and the Court ſeeing it, did award the ſecond *venire facias*; and it ſhall not be intended to be an error, when there is any cauſe to juſtify it: and the cauſe mentioned in the record is not ſo material to bind them; for the office of the Court is to ſee all the cauſes, and to give judgment upon any matter which may appear to them; and it ſhall be intended they did ſo, as 22. *Edw.* 4. 45. b. upon a judgment in a writ of dower.

Want of manucaptors on the *diſtringas* may be amended.

ANOTHER EXCEPTION was taken, Becauſe no manucaptors are returned upon the *diſtringas*.—THE COURT held it ſhall be amended by the ſheriff, and it is not material if no manucaptors be returned when the jury appeareth full, and the verdict given upon it is good, 3. *Hen.* 7. *pl.* 8. And judgment was given for the plaintiff.

CASE 8.

Walſh *againſt* Collinger.

Michaelmas Term, 32. & 33. *Eliz. Roll* 460.

If a plaintiff be made the judge of the court, he muſt be excepted to at the time.

ERROR to reverſe a judgment in the court of *N. I.*—ERROR, That the judgment is entered to be before the mayor and *J. S. et J. D. aldermannis, &c.* and at the ſame time the plaintiff was made mayor, pending the ſuit.—*Sed non allocatur*; unleſs the party had excepted to it in the court, and it was diſallowed there, then it had been error; but if he admits him to be his own judge, it is not error, 2. *Hen.* 4. *pl.* 4.

Moor, 365. Cro. Car. 184. 1. Strange, 640. 2. Term Rep. 87. Caſes in Crown Law, 105.

On a preſcription to hold a court before two aldermen, it may be aſſigned for error that one was not alderman at the time alledged.

SECOND ERROR. The preſcription is to hold courts before the mayor and two aldermen; and it is alledged that at ſuch a court held before the mayor and *J. S.* and *J. D.* aldermen, &c. and alledgeth *in facto*, that *J. S.* was not then alderman. The defendant pleaded *in nullo eſt erratum*.—GODFREY moved that this is no error, no more than in error to avoid a fine, that one of the Judges before whom the fine is ſuppoſed to be levied, was not a Judge. 1. *Ed.* 5. *pl.* 3. b.—But THE COURT (*abſente* POPHAM) held it to be a manifeſt error; for the court cannot be held except before aldermen, ſo there muſt be two at leaſt; and if *J. S.*

was

was not alderman, there were not two aldermen; and it is not like the case of a fine, for that is before such Justices, *et aliis fidelibus*; and if there be no such Judge as one of them which is named, yet the fine being levied before other Justices is good. And for this cause the judgment was reversed.—It was here held by THE JUSTICES, that a discontinuance after verdict is not helped by any statute.

WAISH *against* CULLINGER.

Jeofail.

Griffin *against* Spencer.

CASE 8.

ERROR of a judgment in the common pleas. Error assigned was, That *Spencer* brought debt upon an obligation against *Griffin*. The condition was, that if *Griffin* pay to *Spencer* a hundred pounds within one month after notice of his return from *Constantinople* in *Istria* into *England*, that then, &c. The defendant pleads, that there was no notice given to him of the return, &c. Upon this the issue is taken, and found for the plaintiff; and judgment given for him.—Error was assigned, Because it was not averred, that the money was not paid; and then no cause of action. As in debt for non-performance of an arbitrament the defendant pleads no arbitrament; the plaintiff shall not only say that they made an arbitrament, but also that the defendant had not performed it, in such a part, to inform the Court that there is good cause of action; so here.—But THE COURT held clearly that it was no error; for when the defendant saith he had no notice, this is a confession *per nient dedire* that he had not paid it. And issue being taken upon a collateral matter, and found for the plaintiff, judgment shall be given for him. Wherefore the judgment was affirmed.

Debt on bond for non-payment after notice of a certain event. Plea *no notice*, and issue *thereon*, the plaintiff need not reply that the money was not paid.

Post. 899.
Yelv. 25. 78.
1. Sid. 340.
1. Saun. 102. 317.
3. Lev. 24.
Lut. 528.
1. Vent. 114. 126.
Show. 148.
1. Lev. 55.
Hard. 377.
1. Salk. 138.
3. Bac. Abr. 716.
Dougl. 732.

Read and Morpeth *against* Erington.

Trinity Term, 33. *Eliz. Roll* 611.

CASE 9.

EJECTIONE FIRMÆ. And declares of a lease made by *Anthony Mitford*, 20*th January*, 11. *Eliz.* of 200 acres of land, 100 acres of meadow, and 150 acres *de pasture* in *Pont-Island*, *habendum* from the feast of *St. Michael* last past for twenty years.

Upon not guilty pleaded, the jury find a special verdict, which was thus in substance: "That *Anthony Mitford* was seised in fee of "the manor of *Pont-Island*, in the county of *Northumberland*, of "which the tenements in which, &c. were parcel, and of other "lands called *Crawleys*, in *Pont-Island*, parcel also, *tenement' in* "*quibus*, &c. and of another parcel of land called *Island-Green*, in "*Pont-Island*, parcel of the tenements in which, &c.: and being "so seised, 8. *Eliz.* conveyeth the manor of *Pont-Island* to the use "of himself for life, remainder to *Jasper* his eldest son, and the "heirs males of his body, remainder to the right heirs of *Anthony*: "and the lands called *Crawleys* to the use of the said *Jasper*, and "*Margaret* his wife, and of the heirs males of the body of *Jasper*: "and afterwards to the use of the right heirs of *Anthony*: and the "lands called *Island-Green* to the use of the said *Anthony* and "*Julian* his wife for their lives, remainder *ut supra*"

And they further find, "that *Jasper* had issue *Mary* his daughter, married to the defendant, and afterwards died without issue "male; and that *Jasper* was the eldest son, and heir of *Anthony*."

If a man seised in fee make a feoffment to the use of *A.* in tail or for life, remainder to the use of his own right heirs; the land, upon the death of *A.* without issue, returns to the feoffor as his ancient reversion, and does not vest in his right heir as a remainder by purchase.

Post. 334.
Moor, 284. 744.
Dyer, 135.
1. Leon. 182.
Co. Lit. 22.
2. Co. 91.
1. Mod. 237.
Dougl. 774.

Pop. 3. 2. Ro. Ab. 418. 1. Co. 130.

READ and MORPETH *against* ERINGTON.

And they further find, "that *Anthony*, 11. *Eliz.* makes the leaſe "in the declaration *prout*, &c. and that afterwards the leſſees, 24th "*March*, 11. *Eliz.* made a deed of feoffment of theſe lands to "*Alexander Heron* and others in fee, with a letter of attorney to "enter into them or any part thereof; and to make livery accord- "ing to the deed; and that the attorney made livery in a ſtable "of a houſe, parcel of the manor of *Pont-Iſland*, *Anthony Mitford* "the leſſor being then and there preſent; and that at the time of "the livery the lands called *Crawleys* were in the poſſeſſion of "*Anthony*, as tenant at ſufferance to the ſaid *Margaret* the wife of "*Jaſper*; and that the lands called *Iſland-Green* were in the hands "of divers farmors and leſſees, by virtue of ſeveral leaſes to them "made before the leaſe made 11. *Eliz.*; and that *Anthony* and *Julian* "were dead; and that the ſaid *Alexander Heron*, and the other "feoffees, enter and grant all their term, eſtate, and intereſt to the "leſſees of the plaintiff. *Et ſi ſuper totam materiam*," &c.

NOTA. The jury found that *Crawleys* contained ſixty acres, and *Iſland-Green* one hundred and twenty.

Upon this ſpecial verdict theſe matters were moved.—FIRST, If the remainder limited to the right heirs of *Anthony Mitford* for *Crawleys*, in which he had no particular eſtate, be in him as his ancient reverſion, or veſteth in his right heir as a remainder by purchaſe; for if it were a purchaſe in the heir, it was not charge- able with the leaſe of *Anthony Mitford*.—And all THE COURT reſolved clearly, that the uſe limited to the right heirs of *Anthony* is the ancient uſe in him, and was never out of him, and is in him as a reverſion to grant or charge; and from him ſhall deſcend to his heir, and is as if it had not been mentioned; and the limita- tion to his right heirs is a void limitation, and is no more than the law veſts in him.

A leſſee for years may make a feoffment, notwithſtanding the preſence of the leſſor; for the leſſee has the poſſeſſion, and may diſpoſe of it; but it is an extinguiſhment of the leaſe, and the leſſor may enter for the forfeiture.

Jones, 315. Co. Lit. 48. 84. and ſee the latter part of Mr. Butler's note (1), page 330. in page 337. b. 2. Co. 22. 31. 2. Roll. Abr. 3. 13. Viner, 179. 1. Wood. Con. 503. Dyer, 362. b. *in notis*. 3. Atk. 339. Cowp. 217. 702. 1. Term Rep. 738.

SECOND QUESTION. If this feoffment by the leſſee for years, the leſſor being upon the land, was a good feoffment? For the leſſor (as it was ſaid) cannot be diſſeiſed, he being upon the land; and no freehold can be deveſted out of him: but he being in poſſeſſion guards the land, that no feoffment can be made.—CURIA *contra*. That it is a good feoffment, and ſhall enure by way of feoffment; for the leſſor and leſſee being upon the land, the law ſhall judge him in poſſeſſion that hath the right of it; and the leſſee hath the ſole right to the poſſeſſion; and livery ought always to be given of the poſſeſſion; and therefore he that hath the poſſeſſion ſhall make the livery: and therefore if the leſſor makes livery, the leſſee being upon the land and contradicting it, this is void; for it cannot enure upon the poſſeſſion, nor give it, when the leſſee is there and keeps it; and the law ſhall adjudge it only in him: and when he cannot give or meddle with the poſſeſſion, he cannot make livery. And *è converſo*, when the leſſee hath poſſeſſion he may make livery; and the preſence of the leſſor, which hath nothing to do there, cannot diſturb it: but immediately by his being there, this is an entry by him, and a reveſting of the freehold in him: ſo *Perkins*, *ſ.* and *Dy.* 360.—And POPHAM ſaid, that if it cannot enure as a feoffment, and though it cannot deveſt the freehold, nor be a diſ- ſeiſin to the leſſor, yet clearly it is a forfeiture; becauſe the leſſee had taken upon him to make a feoffment, and give a fee ſimple;

and

and ſo it is an extinguiſhment of his term: as if the leſſee of the queen makes a feoffment, no freehold paſſed; for he cannot deveſt the freehold out of the queen; yet it is a forfeiture.—And for theſe cauſes the Court did clearly reſolve for that part for the defendant: but for *Crawleys*, becauſe it was found to be in the hands of *Anthony Mitford* as leſſee to *Margaret*, it was held that nothing paſſed: and ſo for *Iſland-Green*, as that was found to be in the hands of ſeveral farmors, nothing paſſed, nor was it any forfeiture.

READ and MORPETH *againſt* ERINGTON. 1. Co. 76. a.

THIRDLY, COKE *Attorney General* moved, that the plaintiff had declared of a leaſe made 10. *Jan.* 11. *Eliz. habendum* from *Michaelmas* before: and it appears by the ſpecial verdict it did not commence from *Michaelmas* before; for it was the jointure of *Margaret*, who was tenant for life, and died afterwards; ſo for that it was a leaſe only from the time of her death; and ſo the plaintiff had failed in his declaration.—But THE COURT reſolved, that the declaration was good as to that point; for it being by indenture (as it was found), it is good between the parties: and *Margaret* being dead, it ſhall be ſaid to begin according to the time limited in the indenture; and he cannot declare in any other manner: but if it had been without deed, peradventure it ſhould be otherwiſe.

In ejectment, a leaſe commencing in fact ſubſequent to the time to which the *habendum* relates, is good.

FOURTHLY, It was moved, that for *Iſland-Green* the verdict is for the defendant; for it is found it was in the hands of farmors and leſſees, (*a*) by virtue of leaſes made before this leaſe: and it was not found that their leaſes are ended; and then it ſhall be intended that they yet continue; and then the defendant cannot be guilty of the ejectment of the plaintiff.—But THE COURT conceived this not to be material; it being not found that the defendant claimed under the leſſees; and the plaintiff having entered, and the defendant entering upon him, this is an ejectment of the plaintiff, for which the plaintiff ſhall puniſh him.—And it was reſolved, that for the manor of *Pont-Iſland*, judgment ſhall be for the defendant; and for *Crawleys* and *Iſland-Green*, judgment ſhall be entered for the plaintiff.

A ſpecial verdict in ejectment need not find that the leaſes of the tenants were expired, if the plaintiff does not claim under them.

(*a*) See 11. Geo. 2. c. 19.

CASE 10.

Downs *againſt* Hopkins.

IT was found, by ſpecial verdict, that the land was ancient copyhold land demiſable for one or two lives; and that this land was granted by copy to *J. Downs*, the huſband of the plaintiff, *habendum* to him for life, and to the plaintiff *durante viduitate ſuâ*. The queſtion was, If this were warranted by the cuſtom, for the wife's eſtate? for it is no abſolute, but a limited eſtate.—But all THE JUSTICES did hold, without any argument, that it was good: for when the cuſtom warranted the greater eſtate for life to be made, it doth warrant the leſſer eſtate; ſpecially here, becauſe this is alſo an eſtate for life, but limited, and as it were conditional.—Then it was moved, that the wife was named only in the *habendum*. And it was held good; for it is common in copies. And ſo adjudged, 4. *Co.* 23. 2. B. Ab. 495. 2. L. Ray. 997.

A cuſtom to grant lands to a man for life, and to his wife, *during her widowhood*, is good. Ante, 115. Poſt. 373. 1. Ro. Ab. 511. Pop. 35. 4. Co. 30. 1. Saund. 151. 1. Salk. 188. 2. Vern. 264. 1. T. Rep. 466.

CASE 11.

Hopton and his Wife *againſt* Johns.

ERROR to reverſe a common recovery had againſt the wife and her former huſband, in which they were tenants, and vouched the common vouchee. The error aſſigned was, That the *feme* was an infant, and appeared in perſon, and not by guardian, and loſt;

A common recovery reverſed, becauſe the *feme* was an infant, and appeared in perſon, and not by guardian.—10. Co. 44. Cruiſe on Recov. 144. Ante, 309.

HOPTON *against* JOHNS.

and so is as a recovery by default, although they appeared and pleaded, for that judgment was given upon default; and common recovery is but a common assurance, and not a recovery by title, which peradventure should be good; and an infant cannot make an assurance: and therefore it was erroneous.—And for this cause the judgment was reversed.

CASE 12.

Charter *against* Freind.

Hilary Term, 35. *Eliz. Roll* 502.

An *audita querela* must be brought to vacate a judgment in *rediſſeiſin*.

ERROR upon a judgment in *rediſſeiſin*. The error assigned was, That the plaintiff had entered *pendente breve*, and in this action he is to be restored to the land.—But it was ruled, that he cannot assign this for error; for he cannot plead any thing in this action, especially it being a dilatory plea; but an *audita querela* is his remedy, if he have cause: and here the plaintiff is not to recover land, but to be reseised. Wherefore the judgment was affirmed.

CASE 13.

Milborne *against* Dashburne.

When rent shall commence from the time of possession.

Ro. Co. 107. b. 2. Brownl. 300. 1. Saund. 151. 2. Saund. 166. 1. Vent. 91.

TRESPASS. The case was, A reversion upon a lease for life is granted for life, *cùm poſt mortem* of the tenant for life *acciderit*. The question was, If this shall refer to the commencement of the future time, as to the estate, or to have the land in possession?—And it was ruled, it shall not refer to the commencement of the estate, but to the having the land in possession. 23. *Eliz. Dyer*, 376. 17. *Edw.* 2. "*Executors*," 112.

1. Saund. 251, 152. Ld. Raym. 27. 525. 1. Salk. 233.

CASE 14.

Bishop *against* Grant.

Hilary Term, 35. & 36. *Eliz. Roll* 253.

Rent seck is well demanded *on the land*, though made payable at *another place*.

Cro. Car. 508. 4. Bac. Abr. 353. 358. Dougl. 483.

ERROR of a judgment in an assise of a rent seck in *Kent*, where the plaintiff made his title, that the rent was granted to be paid yearly at the four feasts, *viz. Christmas*, *Annunciation*, *Saint John the Baptist*, and *Michaelmas*, and at another place out of the land; and sheweth, that the rent was arrear for four years at the *Annunciation* last past; for which the plaintiff, "*in* "*crastino prædict' festi Purificationis beatæ Mariæ*," demanded the said arrearages.—FIRST ERROR, That the rent was demanded upon the land, and not at the place where it was payable.—*Sed non allocatur*; for it is well demanded upon the land, and it is not like to a rent reserved upon a lease with a clause of re-entry.

The effect of the relative "*prædictus*" when it does not refer to any *certain* antecedent.

Ante, 311.

SECOND ERROR. That it was demanded after the feast.—*Sed non allocatur*, that no feast of *the Purification* is mentioned before; so it appeareth not that the demand was after the rent was due, or before.—FOSTER moved, that this word "*Purification*" shall be void, and surplusage, and then *prædictum festum* shall refer to the feast last mentioned.—GAWDY. Although the word "*Purifica-* "*tion*" be void, yet *prædict' festum* cannot refer to the last feast; for there are divers feasts mentioned, so it cannot be referred to any one certain: but the word "*Purification*" can be no more void than the word "*prædict'* " shall be void, and the other to stand, *Comment.* 86.—And for this cause the judgment was reversed: but if it had been *et postea* after the said feast of the *Purification*, &c. it had been good; for all after the word *postea* shall be void. And for this cause the judgment was reversed.

Pipe

Pipe and Others *againſt* The Queen.

CASE 15.

Trinity Term, 35. Eliz. Roll 868.

In *quare impedit*, if the patron die *pendente breve*, and judgment be given againſt *him*, the whole is erroneous.

Cro. Car. 592. 2. Leon. 58. 2. Sid. 94. 7. Co. 26. b.

ERROR by *Pipe*, as ſon and heir and executor of *Sir R. Pipe*, the biſhop, and the incumbent, againſt the queen, upon a judgment in a *quare impedit* by the queen againſt *Sir R. Pipe* as patron, the biſhop, and *Bagſhaw* the incumbent, to preſent to the church of *B.* in the county of *Derby*, to which ſhe made title to preſent by lapſe, and recovered. Error aſſigned, For that the patron died *pendente breve*; and yet judgment was given againſt him. —And this was held by THE COURT to be a manifeſt error; for although the death of the patron ſhall not abate the writ, as 9. *Hen.* 6. *pl.* 30. is; yet when judgment is given againſt him, it maketh all erroneous, and ſhall cauſe the judgment to be reverſed in all, for it cannot be reverſed by parcels. This error was confeſſed by the queen's *Attorney*.

Summons and ſeverance in a writ of error.

6. Co. 25. a.

NOTA. All the others were ſummoned and ſevered, except *Pipe*. And this was held good; for as ſummons and ſeverance ſhall be in a *quare impedit*, ſo in a writ of error upon it.

The ſon of a patron may bring error on judgment in *quare impedit*, as both heir and executor.

But then it was moved, that this writ of error was not well brought by the plaintiff as heir and executor together. But THE COURT as to that held it good enough; as a writ of debt may be brought againſt one as heir and executor together.—But then it was moved, that he had no cauſe to bring a writ of error as heir, or as executor; for he cannot have it as heir, for the inheritance is not touched, for the queen only claimed by lapſe, ſo affirmeth the inheritance; and as executor he cannot bring an action, for he hath no damage, for the teſtator had preſented, and the incumbent was in the church; but if the teſtator had not preſented, peradventure it had been otherwiſe: and here all the loſs is to the incumbent, and he cannot reverſe the judgment, for he is ſevered.—But THE COURT held, the writ of error did well lie; for it is to maintain the incumbent in the church: and the incumbent, although he be ſevered, yet ſhall of neceſſity have judgment to be reſtored; for the judgment is entirely to be reverſed.—And *Trin.* 36. *Eliz.* the judgment was reverſed; but it was not ſaid at whoſe ſuit, *viz.* as heir or executor. And it was ſaid the incumbent may well enter; for by the reverſal there is no record of the recovery againſt him.

Buckly *againſt* Williamſon.

CASE 16.

Hilary Term, 36. Eliz. Roll 246.

Judgment ſhall be reverſed where the writ is teſted before the cauſe of action. *Quære.*

1. And. 241. Hob. 199. Cro. Car. 575. Cro. Jac. 70. 4. Bac. Abr. 13. Cowp. 454.

ERROR of a judgment in debt upon an obligation. The error aſſigned was, That the *teſte* of the writ was 15. *September*, 32. *Eliz.* returnable *Octab. Michaelis*, and the money was due at *Mich.* 32. *Eliz.* and ſo after the *teſte*, and before the return of the writ; and this appeared by the condition, which was entered *in hæc verba*. And for this cauſe, although the judgment was after verdict, ſo that if there had been no original it had been good, yet it being brought before cauſe of action, the judgment was reverſed: and it is not aided by the ſtatute of 18. *Eliz.* c. 14.

Dougl. 62.

Case 1.

Allen's Caſe.

Eaſter Term, 36. Eliz.—In the Exchequer.

If the king grant a forfeiture, the grantee may ſue a *ſcire facias* in the king's name. Ante, 44. Dyer, 1. Moor, 241. Keilw. 168. Savil. 133. Owen, 113. Cro. Jac. 179.

A SCIRE FACIAS, was ſued in the queen's name againſt *Allen*, why execution ſhould not be againſt him for a debt that came to the queen by attainder of *J. S.* The defendant pleads, that the queen hath granted over this debt, and all actions and demands for it to *York*. And upon this it was demurred, if the ſuit could be in the queen's name, after it is granted over.

NOTA. In truth there were ſpecial words in the patent, that he might ſue for it in the queen's name; but this was not pleaded. —And THE COURT held clearly, that if it had been pleaded, the ſuit might be in the queen's name; for the queen had this liberty to grant to ſue in her name.

But if, as the caſe is pleaded, he might ſue in the queen's name, the Court doubted. And two precedents were cited: the one, *Eaſter*, 30. *Eliz. Roll* 291. where *Green*, to whom a debt was due, was attainted of felony, and the queen granted over the debt, and all actions and demands for it, and a *ſcire facias* was ſued in the queen's name: the other precedent was, *Hill.* 32. *Eliz. Roll* 216. *Mabb* was indebted by bond to *J. S.* and the debt came to the queen by attainder, and ſhe granted it and all actions for it to *Bowes*, and, notwithſtanding, the ſuit for it, was in the queen's name.—But the Court ſaid, they would ſee the precedents. *Et adjournatur.*

Case 2.

Green *againſt* Edwards.

Hilary Term, 36. Eliz. Roll .

Quære, if a defendant ſhall anſwer to a ſecond information while another for the ſame cauſe is pending. Ante, 261. Cro. Jac. 481. Dougl. 240.

INFORMATION for converting 2000 timber trees into coals to make iron; and demanded 4800l. The defendant pleads, that the ſame plaintiff had another information againſt him for the ſame cauſe, and demanded the ſame ſum; and demanded judgment, Whether he ſhall anſwer to the laſt, pending the firſt?

ALTHAM argued, he was not to anſwer; for when a declaration is made, and the certainty appeareth, there ſhall be no other ſuit for the ſame cauſe, for the double vexation to the defendant. 14. *Edw.* 3. "*Brief*" 318. 22. *Hen.* 6. *pl.* 52. 14. *Aſſ.* 6. *pl.* 29. *Aſſ.* 40. *pl.* 39. *Hen.* 6. *pl.* 12. & 28. 40. *Edw.* 3. 35. 39. *Hen.* 6. *pl.* 14. And there is no difference between the caſe of the queen (as it was objected) and of a common perſon; for the queen ſhall not have two ſuits for the ſame cauſe. 19. *Edw.* 3. "*Brief*" 470. & 33. *Edw.* 3. "*Brief*" 916. & *Q. Impedit*, 58. And if it ſhould be ſuffered, the party ſhall be twice charged, and have no remedy; for an *audita querela* lieth not againſt the queen. 18. *Edw.* 3. *pl.* 2. 45. *Edw.* 3. "*Brief*" 547.

COKE, *Attorney General*, *contra*; for it is but in the nature of a treſpaſs. 5. *Hen.* 7. 15. and it is no plea in treſpaſs, that another is depending; and the queen hath a prerogative above a common perſon. He offered to withdraw the firſt ſuit; but the defendant would not aſſent to plead to the ſecond.

THE BARONS would adviſe; but they ſaid it was not *peremptory*, but a *reſpondeas ouſter*.

Agard

Agard *againſt* Candiſh.

Case 3.

INFORMATION on the 8. *Edw.* 4. c. 2. for giving licences. Upon not guilty, it was found for the queen.

The juriſdiction of the exchequer in matters relating to the crown, can only be taken away by expreſs negative words. (*a*) Plowd. 208.

It was moved by TANFIELD, that the action lieth not in this court; for the ſtatute appoints it to be ſued in certain particular courts therein mentioned, and there is no word of the exchequer.

ATKINSON *contra*. The ſtatute is in the affirmative, and not in the negative, that it ſhall not be ſued elſewhere. *Stradling's Caſe* (*a*).

Sav. 134. Moor, 564. Noy, 117. 2. Haid. 420. 2. And. 127. 1. Bac. Abr. 598.

To this THE BARONS agreed; for this is a ſuperior court, though not named; and ſo ſuit may be here; for there are no reſtrictive words in the ſtatute: and this Court hath power to hold plea in any thing concerning the queen, if not reſtrained. *Et adjournatur.*

Hitchcock and Uxor *againſt* Skinner and Lacy, SHERIFFS OF LONDON.

Case 4.

DEBT upon an eſcape of *Lyſter*, who was taken in execution. And declared, that whereas the plaintiff, as executor of one *Bevill*, brought an action of debt againſt *Lyſter*, and recovered and had execution, the defendants ſuffered him to go at large, and counted in this action in the *debet et detinet*. The defendants pleaded *nihil debent*; and found for the plaintiffs.—It was moved in arreſt of judgment, that the action was not well brought in the *debet et detinet*; for as the firſt action was only in the *detinet*, ſo this action grounded upon the record ought to be, and to purſue it. 10. *Hen.* 7. *pl.* 5. b. 11. *Hen.* 6. *pl.* 17. 9. *Hen.* 6. *pl.* 11. 20. *Hen.* 6. *pl.* 4, 5, & 6. where an executor brings debt for arrearages of account found before auditors aſſigned by himſelf. So in all caſes where an executor ſueth for any thing due to the teſtator, or by reaſon of any ſuch thing: as if an executor recover damages in treſpaſs, *de bonis teſtatoris aſportatis*, and recovers, and then brings debt for the damages, it muſt be in the *detinet*; and in *Scroggs v. Lady Greſſam*, 27. *Eliz. C. B.* where ſhe was executor to her huſband, and ſold lands by virtue of an act of parliament to pay her huſband's debts, it was adjudged ſhe ſhall be charged only in *detinet*; and if a recovery ſhould be in this action in the *debet et detinet*, it ſhall not be to the uſe of their teſtator, but of themſelves.

Debt upon an eſcape from an execution by executors, on a judgment in debt in the *detinet* only, muſt alſo be in *detinet*, and not in the *debet et detinet*. Poſt. 350. 5. Co. 31. b. Cro. Jac. 545. Hob. 88. 184. 272. Noy, 19. 2. Lev. 111. 2. Jones, 47. Lane, 80. 1. Sid. 397. 2. Bac. Abr. 23. 441. 5. Com. Dig. 209. 2. Term Rep. 126.

PERIAM. This action is grounded upon a *tort* done to themſelves, and is not grounded merely upon the record; and is not like the caſes put of debt upon arrearages of account, or upon a recovery, but is merely collateral, for the *tort* done by the ſheriffs in ſuffering the party to eſcape; yet when it is recovered it ſhall be aſſets in their hands, and the action in the *debet et detinet* is well brought.

EWENS and CLERKE *contra*; for the ground of the action is the recovery as executors, and the *tort* is done to them in that right; and therefore the action is to be brought in the *detinet* only.—And it was afterwards adjudged accordingly.

Trinity Term,

36. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Solicitor General.

CASE 1.

Humble *againſt* Glover.

Hilary Term, 36. *Eliz. Roll* 420.

The bargainee of the reverſion of a term cannot bring debt for rent againſt *the leſſee*, after an aſſignment of the leaſe. Poſt. 633. 636. Poph. 55. 120. Gouldſ. 182. Moor, 351. Jones, 44. Dougl. 183. 188.

DEBT upon a leaſe for years, made by *Tho. Play* to the defendant. And declares upon an aſſignment of the reverſion by indenture of bargain and ſale enrolled. The defendant pleads, that after the grant of the reverſion, and before any rent arrear, he aſſigned over his term to —— *Scotmead*, and doth not name his chriſtian name; but a blank was left for it. Upon this plea it was demurred.

FIRST POINT. If the leſſee ſhall be charged with the rent after the aſſignment of his term?—And reſolved he ſhould not. *Vide* 3. *Co.* 23. b. for there is no privity between the bargainee and leſſee, but by reaſon of the privity of eſtate, which being gone, the leſſee is not chargeable: but between the leſſor and leſſee he ſhall not diſcharge himſelf, by aſſigning over his term; for the privity is by reaſon of the contract and reſervation, rather than by the occupation of the land; which by his own act he ſhall not diſcharge: but in this caſe the privity is deſtroyed.

A grant omitting the chriſtian name of the grantee is void. Ante, 57. 59. Co. Lit. 3. a. Cro. Jac. 558.

SECOND POINT. It was moved, that the plea is not good; for a grant to one not naming his chriſtian name is void: for it is uncertain to whom the grant is, except the grant be to one who, by reaſon of his dignity or office, it is known there is no other of the ſame name; as "to POPHAM, *Chief Juſtice*," or "GLANVILE, *ſerjeant*;" and yet in that caſe it muſt be averred that there are no more of that name: and if an obligation or grant be made to one, and his chriſtian name is miſtaken, the grant is void; ſo a grant made by him, *à fortiori*, where there is no chriſtian name.—And of that opinion was ALL THE COURT, except FENNER, and that the plaintiff ſhall have judgment to recover: but no judgment was given, becauſe the plea was diſcontinued.

CASE 2.

Brooke *againſt* Clarke.

Eaſter Term, 36. *Eliz. Roll* 397.

Slanderous words which affect a man's profeſſion are actionable; and though a verdict is found generally where ſome of the counts are for words not actionable, it ſhall be intended that the damages were on the good counts, except the words are laid at different times. Ante, 282. 1. Roll. Ab. 576. Cro. Car. 328. 1. Lev. 134. 10. Co. 130. Moor, 142. 1. Bulſt. 37. 3. Bulſt 283. Cro. Car. 327. 328. March. 48. 1. Sid. 38. Winch. 33. Dougl. 377. 730.

ACTION for words. For that whereas CLARENCEUX, *king of arms*, had a patent of his office; and that he might grant commiſſion to any to be his deputy, to viſit in things concerning his office; and he by his commiſſion did appoint the plaintiff to be his deputy in the counties of *Devon* and *Somerſet*; and the plaintiff by virtue thereof did ſit and enquire of matters concerning the office; the defendant, *præmiſſorum non ignarus*, ſaid of the

plaintiff,

Brooke *againſt* Clarke.

plaintiff, "He came and ſat by force of a forged commiſſion; and "he is a ſcrivener and no HERALD." The defendant pleaded not guilty; and it was found againſt him. And it was now moved in arreſt of judgment, Firſt, That the words would not maintain an action. Secondly, If ſome of the words were actionable, yet others of them were not; and damages were *entirely* given.

To the firſt, THE COURT conceived that the action lieth; for they touch him in his profeſſion, and are very ſlanderous, that he ſat by virtue of a forged commiſſion. And whereas it was objected, that peradventure he did not know it, it is expreſly averred by thoſe words, *præmiſſorum non ignarus:* but if thoſe words had not been in the declaration, it had been otherwiſe; for it might be that he ſat by virtue of a forged commiſſion, and knew it not, and then it touched him not in his credit. And the words, "he "is a ſcrivener, and no herald," touch him in his profeſſion, for by it he getteth his living; and therefore it is reaſon that for them he might bring his action.

And as to the ſecond, all THE JUSTICES held, that judgment ſhall be given for the plaintiff; for it ſhall be intended that damages were given for the words which were actionable.—But POPHAM ſaid, that if an action be brought for words ſpoken at one time, and for other words ſpoken at another time; and for the words ſpoken at one time an action lieth, but not for the words ſpoken at the other time, and damages are entirely aſſeſſed, no judgment ſhall be given; for the action is brought for all the words, and damages for all. And ſo it was held in the *Lord Admiral's Caſe*, 18. *Eliz.*—And afterwards judgment was given accordingly.

Ante, 282. 10. Co. 130, 131.

Chapman *againſt* Thumblethorp.

CASE 3.

Hilary Term, 36. *Eliz. Roll* 113.

TRESPASS for breaking his cloſe, *et quædam averia ibidem exiſtent' cepit et aſportavit.* The defendant pleads, that the cattle were his own goods, and that *J. S.* took them by wrong, and put them in the plaintiff's cloſe by his aſſent; for which, he finding them there, did take them, &c. as it was lawful, &c. And upon this plea it was demurred.

Where goods are wrongfully taken from the poſſeſſion of another, the owner may juſtify the retaking them whereſoever he finds them.

2. Roll. Ab. 569. Bro. Treſ. 323. Cro. Jac. 366. 3. Bl. Com. 4, 5. Dougl. 747.

PUDZEY argued *for the plaintiff*, that the defendant could not enter into the plaintiff's cloſe to fetch them out, except they were put there by the plaintiff's *tort:* and this plea doth amount to a general iſſue; for he cannot traverſe the property of the goods.

But THE COURT held it a good plea; for the plaintiff by his declaration doth not aver the property of the goods to be in him, but ſaith only *quædam averia*. And when the defendant's beaſts are taken from him by wrong, and are not out of his poſſeſſion by his own delivery, he may juſtify the taking of them in any place he finds them. And it was adjudged for the plaintiff (*a*).

(*a*) Defendant. *L. C. B.* PARKER's *MSS.*

Huſelop

CASE 4.

Haſelop *againſt* Chaplin.

Ante, Page 257. *Caſe* 36.

Coſts ſhall be allowed to an avowant for an amerciament. Ante, 257. 300.

IT was now moved again, and divers precedents were ſhewn out of the common pleas, that always ſince the ſtatute damages and coſts had been given to the avowant in avowries for amercements in leets, and for heriots, and other caſes not mentioned in the ſtatute.—And THE JUSTICES conceived that their courſe being ſo ſince the ſtatute, the law ſhall be conſtrued to be ſo; and ſo inclined in their opinion.

Cro. Jac. 28. 520. Cro. Car. 497. 532. 2. Com. Dig. 548. 1. Bac. Ab. 522. 2. Ld. Ray. 788. Dougl. 709. 2. Term Rep. 235.

In replevin, if the writ be "*de averiis*," and the count of "*a horſe*," the variance is fatal. Dig. bk. 9. c. 5.

But then it was moved, that the replevin was *de averiis* taken, and the taking was only of *a horſe*, and ſo ill—And of that opinion was THE COURT, that the count had made the writ falſe. And for this cauſe (*a*) the judgment was reverſed.

Cro. Car. 534. 2. Vent. 153. 2. Salk. 658. 701. 4. Mod. 346. 6. Mod. 303. Theo. 3. Wilſ. 141. 5. Com. Dig. 24. 2. Wilſ. 394. 2. Ld. Raym. 1209.

(*a*) Sed vide Jones, 435.

CASE 5.

Dickins *againſt* Marſhal.

Eaſter Term, 33. *Eliz. Roll* 403.

A deviſe of "*all my lands and goods, after my debts and legacies paid, to A. and B. my children, equally to be divided between them*," paſſes an eſtate for life only in jointenancy. Ante, 9. Poſt. 443. 696. 3. Co. 29. b. Co. Lit. 9. b. 42. a. 190. b. 2. Sid. 53. Moor, 594. Cowlſ. 182. 3. Com. Dig. 34. 2. Vern. 722. Gilb. Dev. 37. 1. Peer. Will. 19. Salk. 391. Swinb. 31. 12. Mod. 296. Ld. Raym. 622. 631. 833. 2. Peer. Will. 280. 3. Brown P. C. 297. 4. Brown P. C. 224. 1. Wilſ. 165. 341. Cowp. 657. 1. Term Rep. 596. 1. Brow. Caſ. Ch. 240.

THE caſe upon ſpecial verdict was, *J. Toby* deviſed all his lands and goods, after his debts and legacies paid, to *R. Toby* and *Mary* his children, *equally to be divided* between them.

The queſtions were, Firſt, Whether an eſtate of inheritance or only a freehold paſſed by thoſe words? Secondly, If they were jointenants or tenants in common?

And after argument THE COURT reſolved, Firſt, That an eſtate for life only paſſed; for although the deviſe of the lands and goods are coupled together, and it be a deviſe for ever of the goods; yet for the land, there being no words to paſs the inheritance, only an eſtate for life paſſeth. And although it was objected that the deviſe of the land is, after his debts and legacies paid; ſo this is limited after he hath made an end of diſpoſing any thing; and it was to his children, of which his heir is one; ſo that he intended to give as much to one as to the other; and that he doth not limit any eſtate over to any other; yet THE COURT held, that only an eſtate for life did paſs.—POPHAM ſaid, it may be doubted if any land did paſs, in caſe he had a term for years in lands; and ſo the deviſe of land may be ſupplied, and that only the term ſhall paſs.

Second Point. They all conceived it was a joint eſtate, and that they ſhall not take by parts in common; for he doth not appoint a diviſion to be made.—But FENNER ſaid, that in 2. *Eliz. Hide v. Southcot*, it was adjudged, that a deviſe of land to two equally divided, this was a tenancy in common. But here it is to two equally to be divided; and it is not certain that a diviſion ſhall be made.

CASE 6.

Barry *againſt* Stanton.

A deviſe is a breach of a condition not to alien. Ante, 60. Poſt. 331. Gould. 49. 184. Poph. 105. 145. 4 Co. 119. Dougl. 57. 184. 2. Term. Rep. 425.

THE caſe upon ſpecial verdict was, "A leaſe was made for years upon condition he ſhall not deviſe the land, or aſſign over his term; and by his will he deviſed it."

GAWDY, FENNER, and CLENCH, held clearly, that the condition was broken; for by this deviſe the term is diſpoſed by his gift, which is an alienation, and is as ſtrong as any other alienation.—But POPHAM delivered no opinion.

Kent *againſt* Sponder.

CASE 7.

SCIRE FACIAS to have execution of land, and damages recovered in an *ejectione firmæ*. The defendant pleaded an entry into the land after the judgment, and before the *ſcire facias*.—And becauſe he did not anſwer to the damages, the plea was ruled ill in all. Wherefore it was adjudged, that the plaintiff ſhall have execution of the land, and damages.

Cro. Jac. 27.

Plea to a *ſcire facias* muſt anſwer the whole matter. Ante, 268. 1. Saund. 27. 2. Saund. 127. 1. Term Rep. 388.

Patridge *againſt* Mayler.

CASE 8.

ERROR upon a judgment in an action upon the 1. & 2. *Philip & Mary*, c. 12. for taking a diſtreſs in one county, and in chaſing and impounding it in another county. The *venire facias* awarded only of the place where the taking was. This was aſſigned for error.—And for this cauſe the judgment was reverſed (*a*).

(*a*) Vide ante, page 260, Note (*a*), to Caſe 46.

Judgment reverſed for miſawarding the *venire facias*. Poſt. 480. 3. Levinz. 48.

Harvey *againſt* Wroth.

CASE 9.

ERROR upon a judgment in dower. Error aſſigned was, That the tenant was an infant, and the judgment was by default. *V.* 5. *Edw.* 3. 70. 17. *Edw.* 3. 47. 17. *Edw.* 2. "*Saver Default*," 80. where an infant ſhall be compelled to ſave his default. It was moved here, that inaſmuch as in a writ of dower the parol ſhall not demur for his nonage, that the infant ſhall be compelled to ſave his default: and ſo it was cited to be adjudged in *Corie's Caſe*, 34. *Eliz.*—*Sed adjournatur*.

Moor, 465.

In dower againſt an infant the parol ſhall not demur. Ante, 308. Poſt. 557. 567. 638. Cro. Jac. 111. 392. 2. Brownl. 118.

Berry *againſt* Taunton.

CASE 10.

Hilary Term, 36. *Eliz.* *Roll* 376.

THE caſe upon ſpecial verdict was, "A leaſe was made to "*Giles Taunton* for eighty years, upon condition that if he, his "executors, or aſſignees do demiſe the lands for more than from "year to year, that then the leaſe ſhall ceaſe and be void. "*Giles Taunton* doth deviſe it to his ſon, and dieth; the ſon enters "by the aſſent of the executor."

The queſtion was, If the condition be broken? for the deviſe is not properly a demiſe.

But all THE JUSTICES held it a breach; for a condition ſhall not be taken ſo ſtrictly, that it ſhall be according to the preciſe words; and if the meaning be broken, it is a breach of the condition; and none will deny but a grant of all his eſtate had been a breach: ſo it is here of a deviſe. And it was ſo adjudged.

A condition by a leſſee that he will not *demiſe* for more than from year to year, is broken by a *deviſe* of the leaſe to his ſon. Ante, 60. Poph 106. 4. Co. 119. Dyer, 45. Dougl. 57. 184. 2. Term Rep. 425.

Lee *againſt* Norris.

CASE 11.

Eaſter Term, 36. *Eliz.* *Roll* 41.

EJECTIONE FIRMÆ. The plaintiff declared of a leaſe by *J. S.* The defendant ſaid, that long time before the leaſe and ejectment, the queen was ſeiſed of the land, and let it to *B.* for years, who let it to the defendant for two years; upon whom *J. S.* the leſſor of the plaintiff entered, and expulſed him, and let it to the plaintiff. And upon this it was demurred, becauſe the plea amounts to non-guilty.

If a ſtranger enters upon the king's leſſee, he gains a poſſeſſion without taking the reverſion from the crown.

GAWDY

LEE *against* NORRIS.

GAWDY.—The plea is good; but if it had been in the case of a common person, it had not been good, without saying, "he ousted the lessee, and disseised the lessor:" but here there can be no disseisin to the queen; wherefore he saith enough, "that he put "out the lessee," for otherwise it is not good, 10. *Edw.* 4. *pl.* 6. for otherwise his entry may be intended lawful. But when he saith, "he expulsed him," this intendeth an unlawful entry, and confesseth in him such a possession, that he may make a good lease against any but him that hath right.—FENNER agreed; and by this entry he hath gained such a possession, that the lessee of the queen may bring an *ejectione firmæ*, although the queen be not put out of the freehold; which POPHAM agreed.

2. Leon. 206. Run. Eject. 15. But now by 9. Geo. 3. c. 16. a possession of 60 years, except to liberties and franchises, will be a bar even to the king's prerogative in this respect.—See also 12. Jac. 1. c. 16. 3. Bac. Abr. 172.

CASE 12.

Nevill *against* Seagrave.

Trinity Term, 33. *Eliz. Roll* 323.

Tender of amends for *damage fait* is good *after* impounding. Post. 813.

REPLEVIN. The defendant avows for damage-feasant. The plaintiff replieth, that the day after the distress taken, he tendered sufficient amends, *scil.* sixpence, which the defendant refused; upon which the plaintiff demurred, because the tender was not before the impounding.

5. Co. 76. a *contra*. 8. Co. 147. Hetl. 16. Cro. Jac. 377. Hob. 154. 3. Bl. Com. 15.

GAWDY.—The tender is good, although the cattle be impounded; and if the party that distrained refuseth it, the owner may take them out of the pound. And it is clear, if the tender were before the impounding, he might take them.—*Quod fuit concessum.* Whereupon THE COURT gave day to the defendant to shew cause to the contrary, otherwise judgment shall be given for the plaintiff.—But TANFIELD at the bar said, it was adjudged in *Sir Henry Cromwell's Case* in the common pleas, that tender after impounding cometh too late.

CASE 13.

Dr. Andrews *against* Wood.

In debt on bond conditioned for the payment of rent on an express covenant, it is not necessary to alledge a demand. Post. 829. Cro. Car. 76.

DEBT upon an obligation. The condition was to perform covenants in an indenture of lease, whereof one was to pay the rent at the day; the breach assigned was for non-payment of the rent. Upon which it was demurred, because no demand of the rent was alledged.—But THE COURT over-ruled it, because it was an express covenant: and by the recovery the obligation is determined. *Sed adjournatur.*

Hob. 8. Dougl. 483.

CASE 14.

Lambert *against* Austin.

Trinity Term, 35. *Eliz. Roll* 185.

Quære, If the executor of a tenant for life of a rent-charge may distrain *upon him in reversion* for arrears incurred in the life of the testator? Post. 547.

REPLEVIN. The defendant avowed upon the 32. *Hen.* 8. c. 37. as executor; for that *Lady Southwell* was seised in fee of the manor of *Weston*, and 3. *Eliz.* granted a rent of 5l. *per annum* to *Richard Adamson* for his life, issuing out of the manor, who made the defendant his executor, and died 28. *Eliz.* and for ten years arrearages between 17. & 28. *Eliz.* he avowed. The plaintiff replied, that after the grant, *scil.* 12. *Eliz. Lady Southwell* made a feoffment of this manor to *Copley*; who 13. *Eliz.* let the land to *Brocket* for twenty-one years, who occupied it for the term, which

Cro. Car. 471. Ld. Raym. 172. 5. Co. 118.

See Mr. Hargrave's Co. Litt. 162. a. note (4) and b. note (1.) 1. Leon. 302. 2. Vern. 612.

expired

LAMBERT *againſt* AUSTIN.

expired 34. *Eliz.* and afterwards *Copley* let it to the plaintiff for three years; upon whom the diſtreſs was taken: and upon this it was demurred. The queſtion reſts only for the rent incurred during the term, if by the ſtatute he may diſtrain for it after the term expired upon him in the reverſion: for the ſtatute is, that he ſhall diſtrain upon the poſſeſſion of the tenant in demeſne which was chargeable with the rent, or any claiming under him.

GAWDY and FENNER, *Juſtices.* The tenant of the freehold is only to be charged, for an aſſiſe only lieth againſt him, and he is the party that is to attorn; and the leſſee for years is only chargeable for his cattle being upon the land, as a ſtranger ſhall be in that caſe; and the intent of the ſtatute was only to give remedy againſt him who was chargeable in the life of the teſtator. And FENNER ſaid, if leſſee for life grants a rent-charge, and then makes a leaſe for years, and dieth, debt lieth for this rent againſt the executors of the tenant for life, and not againſt the tenant for years, for he is not the party chargeable; and in this caſe, if no ſeiſin was had, there is no remedy: for tenant for years cannot give ſeiſin, and a releaſe of this rent muſt be to the tenant for life, and not to the tenant for years.

CLENCH and POPHAM *contra.* That the tenant for years is only chargeable in debt for the rent incurred during the years, and not the tenant of the freehold; and both are chargeable, one with an aſſiſe, and the other with a diſtreſs during the eſtate. Then it is to be conſidered in this caſe, who is chargeable by the intent of the ſtatute. If tenant *pur auter vie* grant a rent, and *ceſty que vie* dieth (*a*), the grantee of the rent dieth, the executors of the grantee have no remedy by the ſtatute; for the ſtatute giving the diſtreſs intends the party that properly and uſually is to be diſtrained, which is the termor in poſſeſſion, and thoſe that come in privity under him: but ſo is not he in the reverſion; and therefore in this caſe the executors cannot diſtrain, but only have an action of debt; and the ſtatute giveth the diſtreſs upon the tenant in demeſne, which is chargeable immediately, and not on him in the reverſion, except his cattle come upon the land by eſcape.

(*a*) The ſtatute extends to *all* tenants for life. Co. Lit. 162.

FENNER. If tenant in tail grant a rent-charge, and then makes a leaſe for years according to the ſtatute, and dieth, the iſſue ſhall hold it diſcharged, and the grantee ſhall not diſtrain during the term. *Quod* GAWDY *conceſſit.—Et adjournatur.*

Folcot *againſt* Ridge.

CASE 15.

PROHIBITION for ſuing for tithe-hay upon fifteen acres of land, ten acres of meadow, and ſeven acres of paſture: And ſuriſeth, that he and all thoſe, &c. time out of mind, &c. had uſed to pay four-pence yearly in ſatisfaction of all tithes of hay cut there, &c. and iſſue upon it. The jury find the preſcription, but that *part* of the land was never moved, but ſhew not what part *in certo.* The queſtion was, If this verdict be certain enough; and for whom it was found?—And it was adjudged for the plaintiff; for both parties are agreed, that all the land had been mowen, and the finding contrary to it is void; and the verdict is certain enough.

If a *modus* be found, though it differ from the ſuggeſtion, the verdict is good. Ante, 238. 1. Term Rep. 427.

Anne ſly

CASE 16.

Anneſly *againſt* Stokes.

Judgment reverſed for *variance* between the writ and the declaration.

Cowp. 178. Doug. 194. 402.

ERROR upon a judgment in debt. For that in the writ he was named "ſon and heir apparent," and in the declaration, "ſon and heir" generally.—And for this variance the judgment was reverſed.—Yet it was ſaid, that "apparent" was ſurpluſage. *Sed non allocatur.*

1. Term Rep. 237.

Trinity Term,

36. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir Francis Beaumond, *Knt.*
Thomas Walmſley, *Eſq.* } *Juſtices.*
Thomas Owen, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Solicitor General.

CASE 1.

Frederick *againſt* Frederick.

A. levies a fine to the uſe of *B.* for life, and after to the uſe of the children of *C. procreatis. C.* had two ſons living at the time; and before the death of *B* had iſſue two daughters. —Adjudged that the *poſtnatæ* ſhall not take.

Ante, 121. 6. Co. 17. a. Jenk. Cent. 248. Moor, 718. 720. 2. Co. 91. Pop. 3. 1. Co. 130. Co. Lit. 9. a. 2. Salk. 675.

PARTITION. The caſe was upon ſpecial verdict. "*A.* levies a fine to *J. S.* which by indenture is declared to be "to the uſe of *B.* for life, and after to the uſe of the children of *C. procreatis: C.* at the time of the limitation had two "ſons, and before the death of *B.* had iſſue two daughters." The queſtion was, If the daughters ſhould take?

After argument at the bar, it was reſolved by THE COURT, (except OWEN) that the daughters ſhould not take.—ANDERSON firſt ſhewed his opinion, that the *poſtnatæ* ſhall not take; but only the children that were *in eſſe* at the time of the limitation; for they ſhall not take as jointenants, nor as tenants in common, nor by way of remainder; and therefore not at all: as jointenants they cannot take; for they were not in being at the time of the limitation of the remainder; nor as tenants in common or by remainder, no more than they could take by an eſtate executed by other conveyances: and uſes are not allowable, but as they are conſonant to the rules of law and reaſon; and it is plain here, that no preſent or future uſes are limited to thoſe that ſhould be afterwards born, and no matter can be collected out of the parties intent to help them.

WALMSLEY accorded. This rule is to be obſerved in uſes. In every caſe there is to be donor and donee, who ſhall take as well in limitation of an uſe, as of an eſtate executed: and although the common law knows nothing of uſes, yet now by the ſtatute an uſe is an eſtate; and to take ſuch an eſtate, there ought to

to be a donee. As if a gift be made to the father, *et primogenito filio*, if he hath no ſon then, the ſon born afterwards ſhall not take, and the uſe ought to be obſerved as it is appointed; and when it is limited in poſſeſſion, it muſt take in poſſeſſion, and *in futuro*, and in expectancy when it is ſo limited; but there muſt be a donee to take at ſuch a time as it is limited (*a*). And where it was objected, that the intent and meaning of the uſes is to be obſerved, it is true, if they be not fond and idle, as in wills, which are greatly favoured for the weakneſs of them that make them. And it is againſt the rules of law and reaſon, and of uſes, that one who is not *in eſſe* ſhould take by an uſe limited in poſſeſſion; and therefore the ſons *in eſſe* ſhall only take it in this caſe, and not the daughters born after. And in the earl of *Bedford's Caſe*, it was ruled by the advice of the Juſtices in the court of wards, that where he made a conveyance to the uſe of himſelf for years, the remainder to his eldeſt ſon in tail, the remainder to the heirs of the earl, although his meaning was (as it appeareth by the words) that his heir ſhould take as a purchaſor; yet it was ruled according to the rules of law, and not according to his meaning; *ſcilicet*, that he ſhould take it as a fee executed in himſelf. And it ſeemeth, that if a limitation be to the right heirs of *J. S.* and he hath iſſue a daughter, and dieth his *feme enſeint* with a ſon, who is afterwards born, yet the daughter ſhall retain it, for ſhe was in the eſtate executed.—BEAUMOND agreed *in omnibus*.

FREDERICK *againſt* FREDERICK.

1. Co. 100. 1. Aſſ. 11. Plowd. 296. 2. Roll. 417. 1. Roll. Rep. 325. Owen, 152.

(*a*) Vide Harg. Co. Lit. 9. a. note (3) where from Hale's MSS. it is ſaid the father takes the whole fee ſimple.

Ante, 321. Moor, 721.

OWEN *contra*: for the intent here appeareth, that all the children ſhall have it; for *procreatis* referreth to thoſe that were born, as to thoſe that ſhall be born; and an uſe is a matter of conſcience.—But it was adjudged by the other Juſtices againſt the daughters.

The Lord St. John *againſt* Talbot.

CASE 2.

FORFEITURE of marriage. And counts, that the father of the defendant held of him by knight-ſervice and died, the defendant, his heir, being within age; whereupon the plaintiff tendered him a marriage; and he refuſed and married himſelf elſewhere, and at his full age intruded; the double value of his marriage not being ſatisfied. The defendant acknowledging the tenure and marriage, traverſeth the tender. And it was thereupon demurred; and ruled, that the tender is chiefly traverſable in this caſe.

In what caſes tender of marriage is traverſable. Poſt. 468. Co. Lit. 82. Cro. Jac. 66. 5. Co. 126.

But THE COURT held, that in a *valore maritagii*, the tender is not traverſable, for the lord ſhall have it without tender.—ANDERSON and WALMSLEY held, that if the heir marry himſelf before tender, the lord ſhall have only *valorem maritagii*, and not the forfeiture; for the tender afterwards, when he is married, is in vain, for he cannot accept of it, and it ſhall not gain to the lord the double value (*a*).

(*a*) This tenure by knight ſervice is now wholly taken away by 12. Car. 2. c. 24. and converted into *free* and common *ſocage*.

Gurney

Case 3.

Gurney and Somes' Case.

A sheriff shall be allowed 12d. in the pound for the first 100l. and 6d. for every pound above 100l.; and for non-payment he may bring debt.
Post. 654.
Cro. Car. 287.
Cro. Jac. 103.
5. Com. Dig. 598, 599. 2. Term Rep. 148. 155.

DEBT for 35l. for their fees, as sheriffs of *London*, for executing a *capias ad satisfaciendum* directed to them; and demanded by force of the 29. *Eliz.* c. 4. twelve-pence in the pound for the first one hundred pounds, and sixpence in the pound for the residue. It was thereupon demurred.—First, Because there is not any action given by the statute.—Secondly, Because they ought to have but sixpence in the pound, where the sum exceeds fifty pounds, and not to take twelve-pence in the pound for the first one hundred pounds, and sixpence for the residue.—And so THE COURT held upon the first argument in both points.—*Sed quære, quia adjournatur.*

Case 4.

Ferrer *against* Johnson.

A *variance* between the declaration and the finding of the jury in a matter not essential to the nature of the action, is immaterial.
Ante, 288.
Co. Lit. 233. b.
Post. 839.
Bull. N. P. 76.
Dougl. 194. 402. 665.
1. Term Rep. 238.
11. Co. 4. a.
Cro. Car. 279.

ACTION upon the case, for disturbing him of an office. The plaintiff made a special title to it, and a special verdict was found, wherein a title variant in part from that which was alledged, was found.

And after divers arguments it was held PER CURIAM, that notwithstanding the variance, the plaintiff should have judgment: for WALMSLEY said, that the title in this action was superfluous, and the variance found was not material.

And it was held PER CURIAM, that if one grant an office of bailiff or steward, or the like, with the profits thereof, without rendering an account, he cannot discharge the grantee, but he shall continue to have the profits of the office; but otherwise it is, if no fee or profits had been granted for the exercising thereof.—And WALMSLEY held, that one may grant an office, *habendum* after the death of *J. S.* for it varieth from the case of land, &c. And the plaintiff had judgment.

36. & 37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt.* *Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke, *Knt.* *Attorney General.*
Sir Thomas Fleming, *Knt.* *Solicitor General.*

Ro. Blackwell *againſt* Eyre.

Hilary Term, 36. *Eliz.* *Roll* 404.

CASE 1.

In an action upon promiſes to pay a ſum of money, if the plaintiffs would forbear to enforce their title, the declaration ſtated that "*quidam exitus*" was joined in *ejectment*, and ſo ſtates throughout only *one iſſue*. It was found that *two iſſues* were joined, one upon *not guility*, the other upon a *ſpecial plea*. The Court held, that "*quidam exitus*" were general words, and referred to *both the iſſues*.

S. C. Moor, 351.

ASSUMPSIT. And declared, *quòd cùm quidam exitus in quâdam actione ejectt' firmæ* of the leaſe of *Blackwell* the plaintiff, *junctus fuit inter Anth. Buxton querent' et R. Senior et Geo. Nedham et Hen. Bradly* defendants, *ad quem exitum triandum*, the ſaid *Anth. Buxton* had ſued out a *venire facias*; the defendant, in conſideration that the ſaid *Anth. Buxton* and *R. Blackwell* the plaintiff, *ad triandum exitum prædict' parcarent inforciare* their title; *ſed darent tenuem et parvam evidentiam ſuper triationem exitus verſus præfat' R. Senior, Geo. Nedham, et Hen. Bradly*, aſſumed to pay to the plaintiff two hundred and ſeventy pounds, *ſcil.* twelve pounds at the feaſt of *St. Michael* next enſuing, and twenty-four pounds at every other feaſt of *St. Michael*, until the two hundred and ſeventy pounds were paid; and if default of payment ſhould be made of any of the ſaid ſeveral ſums by the ſpace of one month, then he would pay for every month after ſuch default twenty ſhillings *nomine pœnæ*; and alledged in fact, *quòd exitus prædict' triatus fuit*; and that the ſaid *A. Buxton* and the plaintiff ſpared to enforce their title, and gave but ſmall evidence *ſuper triationem exitus prædict'* againſt the ſaid *R. Senior, G. Nedham, et H. Bradly, ſic quòd juratores jurati ad triandum exit' prædict' dixere*, that the ſaid *R. S. G. N. et H. B.* were NOT GUILTY; and alledges in fact, that the defendant did not pay the ſaid twelve pounds at the feaſt of *Michaelmas* aforeſaid, and that thirty-four months are paſſed ſince the ſaid feaſt, after the ſaid feaſt, till the tenth of *June*, 35. *Eliz.* and that the defendant had not paid the ſaid twelve pounds at the ſaid feaſt of *St. Michael*, 32. *Eliz.* nor within one month after, nor the thirty-four pounds forfeited *nomine pœnæ*: and for the non-payment, &c. he brought his action. The iſſue *non aſſumpſit*. The jury find a ſpecial verdict, that in the ſaid firſt action of *ejectione firmæ* there were two iſſues joined, *ſc. R. S.* pleaded "not guilty," and *G. N.* and *H. B.* pleaded "a "ſurrender of the term;" and *iſſue* upon them; *et ſi ſuper totam materiam, &c.* The queſtion was, If this verdict be for the plaintiff or the defendant?—It was moved, that the word *exitus* was a general word, and might be referred to both the iſſues; and ſo is good *reddendo ſingula ſingulis*, and relied upon 28. *Edw.* 3. *pl.* 97. 41. *Edw.* 3. "*Brief.*" 4. *Hen.* 6. *pl.* 11. But it was anſwered, that although *exitus* be general, and may be referred to divers iſſues, yet it being coupled with *quidam*, this reſtrained it to one; and *junctus fuit* is in the ſingular number, and ſheweth it cannot be

BLACKWELL *against* EYRE.

be intended to refer to more iſſues. And the plaintiff afterwards ſheweth that *exitus prædict' triatus fuit.*: and that the jurors ſaid, that they three were not guilty, ſheweth his intent to be, that but one iſſue was joined; and the verdict findeth the contrary to it; and ſo he hath failed of his conſideration.—But THE COURT held, that the words *quidam exitus* being general, ſhall refer to both; and in this it may be intended, that they meant both; and in that it is afterwards ſaid, that the jury found them not guilty, this is but nugation; and he needed not to have ſpoke of the verdict, and ſo is not material: and of that opinion was THE WHOLE COURT. *Et adjour'*.—At another day it was moved again, POPHAM and GAWDY being abſent. And CLENCH and FENNER held their former opinion.

Poſt. 427.

2. Com. Dig. 333.

1. Salk. 384.

And then another matter was moved, that it was not ſhewn how long the payment of the twenty ſhillings ſhould continue; for it is not ſaid, *quouſque* the plaintiff ſhall be ſatisfied.—But they held it not material, for it ſhall be intended till they be ſatisfied: and they gave judgment for the plaintiff, and ſaid he might have a writ of error if he would.

CASE 2.

Button *againſt* Wightman.

A grant by ſuch a college "*in* "*Academiâ* "*Oxon*, ſhall not be avoided for the miſnomer, although the college was not named "*in* "*Academiâ*" in the charter of incorporation, but in "*Oxon*" only.

EJECTIONE FIRMÆ, for lands in *Harrow*, upon a leaſe by *Lord North*. Upon ſpecial verdict the caſe was, "38. *Hen.* 8. "the dean and canons of *Chriſt-Church in Oxon* were incorporated by the name of THE DEAN AND CHAPTER OF THE "CATHEDRAL CHURCH OF CHRIST, OXON, *ex fundatione regis* "*Henry* 8. And 1. *Edw.* 6. they make a feoffment to *Edward* "*Lord North*, by the name of THE DEAN AND CHAPTER OF "THE CATHEDRAL CHURCH OF CHRIST *in Academiâ Oxon ex* "*fundatione Regis Hen.* 8. Afterwards, 12. *Eliz.* they make a "leaſe of the land for years, by the true name of their corporation to the defendant." And the jury find further, "that the "*city of Oxon*, and the *univerſity of Oxon*, *ſunt unum et idem in cir-*"*cuitu*; but the liberties of the univerſity extend further than the "limits of the city."—The queſtion was, If this addition "*in* "*Academiâ*" be ſuch a *miſnomer* as ſhall make the feoffment void? —FENNER. This *miſnomer* is a material variance, for the place of the name of a corporation is material; for a corporation cannot be without a name, and *Oxon*, *et Academiâ Oxon*, are diverſe, *quæ in uno cadere non poſſunt*, although both contain the ſame thing. As a grant to an abbot, and all the perſons of the convent, or to a mayor, and all the perſons of the corporation, is not good, 13. *Edw.* 4. 22. *Edw.* 4. for it is not by the name of their corporation; and it is no addition to name one of the univerſity of *Oxon*; and that they are both of the ſame content, is not material.—POPHAM, CLENCH, and GAWDY, *contra*. We all agree there muſt be a local place of a corporation; and ſo it is here, though not ſo preciſely; and the recital of the local place by another name is good; and it is not neceſſary to recite the place by the very letter of the place. 44. *Edw.* 3. *pl.* 16. a recovery was had againſt the prior of the *Hoſpital* of *St. John's* of *Jeruſalem*; and in a *ſcire facias* upon it, the word *Hoſpital* was omitted, yet held good. *L.* 5. *Edw.* 4. 20 *the Caſe of the Abbot of York*, *&c.* *Oxon*, and the univerſity of *Oxon*, are by intendment both one, and ſo are in common knowledge. 28. *Hen.* 6. *pl.* 8. *the Caſe of*

10. Co. 125. a.

Prior, &c. And if a corporation be made of a town, and then it is made a city, and they grant land by the name of a *city*, it is good. —And by POPHAM: An univerſity is as much a local place as a town, and there be divers colleges founded *in Academiâ Oxon*, without any other place; which doth prove it is a local place, and is all one with the city. And there is a great diverſity in the name of a corporation, between the name before the place, and after of the place; for that which is precedent before the place ought to be preciſely obſerved; but in the name of the place, it is ſufficient if it be ſhewn by circumſtances. And therefore *Oxon* and the *Univerſity of Oxon* being both one in common knowledge and ſpeech, and well known, a grant ſhall not be avoided by this *miſnomer*.—And judgment was given for the plaintiff, and the defendant immediately brought a writ of error.

BUTTON *againſt* WIGH-MAN.

Jordan *againſt* Cleabourne.

CASE 3.

Eaſter Term, 35. *Eliz. Roll* 144.

EJECTIONE FIRMÆ, of the third part of a cloſe called *Gate-houſe* cloſe. After verdict for the plaintiff it was alledged in arreſt of judgment, that an *ejectione firmæ* lieth not of a cloſe, although a name be given to it; for it is in the nature of a *præcipe* of land, which ought to be of a certain number of acres.—POPHAM and GAWDY: It is but a perſonal action, and a treſpaſs in its nature; and although an *habere fac' poſſeſſionem* lieth upon it, yet a name being given to the cloſe, the ſheriff may well take cognizance of it; and in 22. *Eliz.* it was ſo adjudged.—CLENCH and FENNER, *contra*; for all the precedents are, that it ſhould be demanded by a certain number of acres. *Et adjourn'*.—In the ſame Term, in *Palmer v. Humphry*, which is entered *Trinity*, 35. *Eliz. Roll* 815. an *ejectione firmæ* was of a garden called *Minchin's Garden*, of a meadow called *Dale Meadow*, and of a piece of land called *Minchin's Piece*; and being found for the plaintiff, it was moved in arreſt of judgment, that an *ejectione firmæ* lieth not of a piece of land without ſhewing the number of acres. *Vide* 5. *Hen.* 7. *pl.* 9. 45. *Edw.* 3. "*Brief*" 388. 11. *Hen.* 4. *pl.* 43. and adjudged that the *ejectione firmæ* was well brought. But upon a writ of error, the judgment for this cauſe was reverſed.—NOTA, *Eaſter*, 38. *Eliz. Roll* 453. in *Penn & Merevill*, EJECTIONE FIRMÆ *de unâ virgatâ terræ*; adjudged in the exchequer-chamber, that it lieth not.

The ſame exact deſcription is not neceſſary in an *ejectment* as in a *præcipe*; but it will not lie for land by any deſcription without ſhewing the number of acres. Sed vide ante, 235. Poſt. 854. Ley. 82. 1. Lev. 215. Palm. 102. Cro. Car. 435. 471. 573. Moor, 222. Owen, 18. 11. Co. 55. 1. Salk. 254. Ld. Ray. 1470. Str. 54. 1063. 1084. B. R. H. 127. 1. Burr. 623. Cowp. 349.

3. Bac. Ab. 169. Dougl. 305.

Ireland's Caſe.

CASE 4.

ERROR upon a judgment in a *replevin* in the common pleas. The declaration was in *Eaſter* Term: the defendant imparled, and afterwards pleads, and nothing done more in *Michaelmas* Term. In *Hilary* Term the plaintiff replieth, and they were at iſſue. After evidence, and before verdict, the plaintiff was nonſuit; but the jury gave a verdict for the damages. The plaintiff aſſigneth this for error, that it was a diſcontinuance.—THE COURT held it to be a manifeſt fault, and the plaintiff might aſſign it, though it was for his advantage. And it was held, that though a verdict was given for the damages, yet it is but in the nature of an inqueſt of office; and therefore it is a diſcontinuance not helped by the 32. *Hen.* 8. c. 30. or 18. *Eliz.* c. 14. as diſcontinuance after verdict found. The judgment was reverſed.

A nonſuit in *replevin* after evidence, is not a trial within 32. *Hen.* 8. c. 30. though the jury aſſeſs damages for the avowant. Poſt. 422. Gouldſ. 49. Hob. 69. 1. Bac. Ab. 91.

CASE 5.

Long *againſt* Michell.

In *B. R.* if the record of the *poſtea* and writ of *hab. cor.* are not properly certified, the judgment on them ſhall be reverſed.

ERROR of judgment in the common pleas. The error aſſigned was, That the judgment was given upon a verdict by *niſi prius*, and there is no record of the *poſtea*, nor the writ of *habeas corpora* certified, nor in the cuſtody of the *cuſtos brevium*, which is the office for this purpoſe: and upon a writ of diminution it was certified accordingly. But it was alledged, that inaſmuch as in the plea roll the record maketh mention, that the verdict was given and certified, and judgment given upon it, it is well enough; for this is the principal record.—But THE COURT held, that every officer hath his ſeveral charge, and their courſe is to be obſerved. In the common pleas the courſe is, that the plea roll ſhall be warranted by the record of the *poſtea*, which is always to remain with the *cuſtos brevium*; and when it is not warranted by it, it is erroneous. But in this court the plea roll is the chief record, and the *poſtea* is entered in it, and judgment given upon it; and if the *poſtea* be certified, and is afterwards loſt, it is not much material. Therefore for this cauſe they held it error. *Sed adjournatur.*

Poſt. 367, 369. 433. 466. See the caſe of Farc v. Denn, 2. Burr. 363.

CASE 6.

Griffith *againſt* Williams.

Hilary Term, 36. Eliz. Roll 610.

Ejectment in *Wales* may be ſued by *plaint*, and without uſing the words *vi et armis*. F. N. B. 220.

ERROR upon a judgment in *Wales* in *ejectione firmæ*.—Firſt Error, That the words *vi et armis* are not in the declaration.—Second Error, The ſuit there was by plaint, whereas it ought to be by original.—WILLIAMS, *ſerjeant*. None of theſe are errors. For as to the firſt, it may be one way or other, 7. *Hen.* 6. *pl.* 4. 17. *Edw.* 3. *pl.* 1. and it is after verdict, and is but matter of form; and cited a precedent, *Trin.* 33. *Eliz. Lawſel & Spring*, that this is helped after verdict. And as to the ſecond error, the 34. *Hen.* 8. c. 26. which appoints, that for lands in *Wales* the action ſhall be by original, is to be intended in real actions, in which lands are demanded, but this action is in the perſonality.—And THE COURT held, that judgment was to be affirmed. *Sed adjournatur.*

CASE 7.

Laurence Tanfield *againſt* Rogers and Watſon.

Eaſter Term, 36. Eliz. Roll .

A leaſe by tenant in tail of the ſcite and demeſnes of a manor, *ac etiam totum illud manerium de A. &c.* reſerving the ancient rent for the ſcite and demeſnes, and another rent for the manor itſelf, is a good leaſe for the ſcite and demeſnes; for the reſervations being ſeveral, they are as ſeveral leaſes. S. C. Owen, 119. Ley. 74. 77. Cro. Jac. 458. 5. Co. 55. 139. 3. Bulſt. 230. Moor, 197. Co. Lit. 44. Cro. Car. 23. 3. Bac. Abr. 363. 4. Bac. Ab. 343. B. R. H. 246. 1. Salk. 390.

REPLEVIN for taking of cattle at *Clanfield* in *com' Oxon'*.—*Rogers* avows in his own right, and *Watſon*, as bailiff of *Chapman* and his wife, made cognizance for damages feaſant, as in their freehold. The plaintiff ſaid, that long time before the taking, *J. Edmuns* was ſeiſed of the manor of *Clanfield* in fee, and gave it to *Thomas* his ſon, and *Agnes* his wife in tail; and that *Thomas* died, having iſſue by the ſaid *Agnes* two daughters. *Agnes* enters, and by indenture 25. *Eliz.* let to *J. Fox* the ſcite of the manor, and all the demeſne lands of the ſaid manor, and all other lands with it enjoyed by the ſaid *Fox*; "*ac etiam totum illud manerium de Clanfield ac omnia terras et tenementa eidem manerio ſpectant.*' HABENDUM the ſaid ſcite and demeſnes, and alſo the ſaid manor and premiſes, to the ſaid *J. Fox* for twenty-one years, from the day of the date of the indenture, yielding and paying for the ſaid

" ſcite and demeſnes and premiſes therewith letten 3l. 6s. 8d. " and yielding and paying for the ſaid manor and premiſes there- " with letten, 9l. 10s." and conveyed the eſtate of *J. Fox* to himſelf, and that he put in his cattle; and averred, that the land where the taking was, was at the time of the leaſe parcel of the demeſnes of the manor, and were in the poſſeſſion of the ſaid *J. Fox*; and that the ſaid ſcite and demeſnes had been uſually let for twenty years before, and that the rent was the ancient rent; that they were not then in leaſe, and that the leaſe was not without impeachment of waſte; and that *Agnes* is dead, and the two daughters were the heirs of the body of *Agnes*, in whoſe right the avowry was. The defendant demanded *oyer* of the indenture, which was entered *ut ſupra*; and pleads, that the manor was not let for the greater part of twenty years before the leaſe made: and upon this the plaintiff demurs. The queſtion was, If this were a good leaſe for the ſcite and demeſnes which had been uſually let, and avoidable for the reſidue (*a*); or being both joined in one leaſe, is avoidable in all? —And it was moved, though it be by one indenture, yet the words being ſeveral in the demiſe and the *habendum*, and ſeveral reſervations, this is not a joint but ſeveral leaſe; and one leaſe for the ſcite and the demeſnes, and another for the reſidue of the manor. 14. *Eliz. Dyer*, 308. *Winter's Caſe*. But admitting it to be a joint leaſe, yet when one rent is reſerved for the ſcite and demeſnes which had been uſually letten, and another rent for the manor, ſo the rents are ſeveral and diſtinct, and ſo no prejudice to the iſſue in tail, and no danger of apportionment.—But of the other part it was urged, that this is an entire leaſe; for when ſhe firſt lets the ſcite and demeſnes, and after lets the entire manor, it is as if ſhe had let the manor entirely, and the rent reſerved as iſſuing out of the whole manor.—At the end of the term it was moved again: and all THE JUSTICES reſolved there are ſeveral reſervations; and ſo the leaſe is good for the ſcite and demeſnes; and it ſeemeth that theſe ſeveral reſervations, and the ſeveral words in the *habendum*, make it as ſeveral leaſes: but they ſaid it was not much material whether it be ſeveral leaſes, in regard there are ſeveral reſervations. And it was adjudged for the plaintiff.

TANFIELD *againſt* ROGERS and WATSON. 2. Term Rep. 415.

Vide Moor, 97. 4. Leon. 27. 5. Co. 55.

(*a*) See the 32. Hen. 8. c. 28. ſ. 2.

Cherbourn *againſt* Rye.

CASE 8.

DEBT upon a leaſe for years of a houſe and land. The defendant pleads, that the leſſor had entered upon part of the land let, and that he had pulled down part of the houſe, and ſo had ſuſpended his rent. The plaintiff replieth, that the defendant had re-entered into the land, and into that part where the houſe ſtood. And hereupon it was offered to demur.—BROMLEY moved, if the rent were not revived by the re-entry into the land where the houſe ſtood.—POPHAM and GAWDY conceived the rent is not revived; for when the houſe was let, it is part of the cauſe for which the rent was reſerved; and when the leſſor had taken from him part of the benefit, *ſcil.* the houſe, yet his re-entry into the land where the houſe ſtood, doth not revive the rent. FENNER and CLENCH doubted. *Et adjournatur.*

Qu. If the re-entry of a leſſee upon the entry of a leſſor who had pulled down part of the demiſed premiſes, revives the rent?

1. Roll. 940. See the caſe of Hunt v. Cope, Cowper. 242. and the caſes there cited.

Case 9.

Peter Palmer *againſt* Boyer.

Words impeaching the *knowledge of a lawyer* in his profeſſion are actionable.

ACTION FOR WORDS. That he being a counſellor at law, and ſteward to *J. S.* of his manors, the defendant ſaid of him, "He is a paltry lawyer, and hath as much law as a jack-an-ape." Upon not guilty pleaded, it was found againſt him, and damages twenty pounds. And it was moved that the action lieth not; for it is not ſaid, he had "no more law than a jack-an-ape."—But it was adjudged for the plaintiff; for the words are ſcandalous, and touch him in his profeſſion.

Case 10.

Baxter *againſt* Shade.

Words which impeach *the integrity of an officer* are actionable.

Poſt. 438. 2. Hawk. P. C. ch. 69. 53.

ACTION FOR WORDS. "Thou art a forſworn jack in the "court baron of *D.* Thou haſt ſworn me out of twenty ſhillings rent, and haſt me on thy ſide."—Adjudged that the action lay, and the plaintiff recovered.

Case 11.

Ball *againſt* Roane.

Words of diſgrace and reproach ſhall be taken in their worſt ſenſe. Ante, 308. 2. Com. Dig. 317.

ACTION FOR WORDS. "There was never a purſe cut "within twenty miles of *Wellingborough*, but thou hadſt thy "part in it." And avers, that ſuch a purſe was cut, &c. and he had no part in it.—And it was moved, that an action lieth not; for it is not ſaid he had a part of it as a partaker in the felony; for he may have a part in it in the loſs, and ſo it is no ſlander.—But it was adjudged for the plaintiff; for the words ſhall be taken to be ſpoken in the worſt ſenſe, in diſgrace and reproach of the plaintiff. —NOTA, *Serjeant Yelverton* cited a caſe, *Paſch.* 32. *Eliz. Sir Edward Haſtings* brought an action for theſe words: "You have procured "a perjured man to ſeek my blood;" and ruled, that an action did not lie. But FENNER ſaid the caſe was not adjudged, but ended by his arbitrament.

Case 12.

May *againſt* Middleton.

Trinity Term, 35. *Eliz. Roll* .

The plea of *foreign attachment* pending the bill, pleaded to debt on bond, goes in *bar*, and not in *abatement*. Ante, 253. Ld. Raym. 691. 2. Salk. 519. 12. Mod. 541. Dougl. 363.

DEBT upon an obligation of 80l. The defendant pleads, that the plaintiff pending the bill brought againſt him a plaint in *London*, and there by cuſtom had attached forty pounds of a debt due to the defendant in the hands of *J. S.* in ſatisfaction of forty pounds due upon this bond; and demanded judgment of the bill, and prayed it might abate. And to this the plaintiff did demur; for this amounts but to an acceptance of part *pendente billâ*, which goeth in bar, and not in abatement.—And it was argued by GODFREY *for the plaintiff*, and ALTHAM *for the defendant*.—And all THE COURT (except POPHAM) conceived that it is a plea in bar, and not in the abatement of the bill; for the plaintiff for this part is to be barred for ever; and this receipt of parcel is a lawful act. But if the defendant enters pending the writ, this ſhall abate the writ; for his entry may be unlawful.—And FENNER ſaid, it hath been ſo adjudged in the common pleas. *Vide the Book of Entries, fol* 159. a precedent accordingly.—And they adjudged it

ſo,

so, against the opinion of POPHAM; because the plaintiff by his own act doth falsify his own writ. But it was said a recovery is by act in law, which may help the case; otherwise of a bare acceptance.

MAY *against* MIDDLETON.

Brent *against* Ingram.

CASE 13.

ACTION FOR WORDS. For that the defendant said to *J. Brent*, son of the plaintiff, in the presence of divers, "Thou "(*præfat. J. Brent innuendo*) and thy father (*innuendo* the plaintiff) "were both perjured; and I (*innuendo* the defendant) will prove "you both perjured." Upon not guilty, it was found for the plaintiff, damages twenty pounds. And it was moved in arrest of judgment, that it was not averred that *J. B.* was the son of the plaintiff.—But it was held well enough, for that it was alledged, that the words were spoken to *J. Brent* his son. And it was adjudged for the plaintiff.

A father may maintain an action for slandering him *and his* son, without averring that he is his son.

Cro. Jac. 444. 2. Stra. 899.

Lacy *against* Whetston.

CASE 14.

ASSUMPSIT. And declared, that whereas there were divers controversies between the plaintiff and defendant concerning the right of the office of steward and clerk of the court of pleas in *Peterborough*, and concerning the right of the court of *pypowders* in *Peterborough*, and concerning the office of stewardship and clerk of divers courts of the dean and chapter of *Peterborough*, and concerning an annuity of six pounds thirteen shillings and fourpence granted by the dean and chapter of *Peterborough* to *J. S.*; and that whereas they submitted themselves to the order of *Mr. Heron de præmissis fiend'*; the defendant, in consideration that the plaintiff of his part assumed to stand to the award of *Mr. Heron*, did assume to stand to and perform the award and order of *Mr. Heron de præmissis fiend'*. And alledges *in facto*, that *Mr. Heron* made an award, that the defendant should have and enjoy the said office of steward and clerk of the pleas, and of the said court of *pypowders*, without interruption of the plaintiff; and that the plaintiff should enjoy the stewardship of the courts of the said dean and chapter of *Peterborough*, and the court of *pypowders*, without interruption of the defendant; and also the said annuity of six pounds thirteen shillings and fourpence; and that the plaintiff should make an assignment of all his right in the said office of steward and clerk of the court of pleas in *Peterborough*, and of the court of *pypowders* there, to the defendant in such manner as he shall advise; and further awarded, for that the defendant had exercised the said office of steward of the courts of the said dean and chapter without the assent of the plaintiff, and for divers other considerations, and for the quieting of all controversies between them, that he should pay to the plaintiff thirty pounds within three months then next ensuing: and for non-payment of the thirty pounds he brought this action. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages forty pounds.—And it was now moved in arrest of judgment: First, That the arbitrament is not made according to the submission; for the submission

On a submission concerning *the right* to an office, if the arbitrator award that for divers *other* considerations one party shall *enjoy* the office, it is sufficient; for it shall not be intended that there were *other* matters in difference, and *his right* to the office is implied in the order that shall *enjoy* it.

Ld. Raym. 664.

LACY against WHETSTON.

was for the right of the office, &c. and the award is only, that the defendant ſhall enjoy the office, and ſpeaks not of the right of the office.—*Sed non allocatur*; for the award is, that he ſhall enjoy the office, which doth imply the right of office; and the award is, that the plaintiff ſhall make an aſſurance of the right of the office, which is as much as the ſubmiſſion requireth.—Secondly, it was moved, that the award is, for that the defendant had meddled with the office of, &c. without aſſent of the plaintiff; and for divers other conſiderations, and for ending all controverſies, that he ſhall pay thirty pounds, &c. which is void; for that the arbitrator awards this for other conſiderations, with which he was not to meddle, and for the ending of all controverſies which is out of the ſubmiſſion; for he was to meddle only with the controverſies concerning the offices, &c. and the ſubmiſſion is to his award *ſuper præmiſſis*.—*Sed non allocatur*; for other conſiderations being but general parlance, implies nothing, except expreſs conſiderations were ſhewn; for otherwiſe none ſhall be intended: but if any had been found which were not within the ſubmiſſion, this would make the award void for that part; ſo in that it is awarded for the ceaſing of all controverſies between them, &c. it ſhall not be intended there were any except concerning the offices, if none be ſhewn in the award or by averment; and this being ſo in a general intendment, is good. And it was adjudged for the plaintiff.

Poſt. 661. 858. 861.

CASE 15.

Walter Dennis *againſt* Wells.

Michaelmas Term, 34. & 35. *Eliz. Roll* 147.

If part of a debt be levied on a *fi. fa.* and the plaintiff afterwards ſues a *ca. ſa.* to outlawry for the *whole debt*, the outlawry ſhall be reverſed.

ERROR of a judgment and execution ſued in the common pleas. Error aſſigned was, For that the ſaid *Wells* recovered againſt the ſaid *Dennis* a debt of four hundred marks, and had execution by *fieri facias*; and upon it the ſheriff returned, that he had levied ninety pounds, parcel of the debt, and had the money in court; and that *Dennis* the defendant had no more goods; *unde*, &c. and notwithſtanding *Wells* ſued a *capias ad ſatisfac'* of the whole four hundred marks, and an *exigent* upon it. Upon which *Dennis* was outlawed; and to reverſe this outlawry and execution, he brought a writ of error.—And for this cauſe it was held clearly by THE COURT, that the execution and outlawry were erroneous; for it ought to have made mention of the ninety pounds which was levied before: and the outlawry and execution were reverſed; but no error being aſſigned or found in the judgment, that was affirmed. 44. *Edw* 3. 12. 4. *Hen.* 7.

1 Roll. Ab. 904.

CASE 16.

Callard *againſt* Callard.

A father, being ſeiſed in fee, in conſideration of his ſon's marriage ſays, upon the land, "*Euſtace, ſtand forth; I do here reſerving an eſtate for my own and my wife's life, give thee theſe my lands and* BARTON, *to thee and thy heirs.*" The queſtion was, If this was a good feoffment to *Euſtace*?—COKE, *Attorney General, for the plaintiff.* There are two points to be conſidered: Firſt, If this ſhall inure as a

EJECTIONE FIRMÆ. The caſe upon ſpecial verdict was, That *Thomas Callard* being ſeiſed in fee of certain land, in conſideration of a marriage of *Euſtace* his eldeſt ſon, ſaid theſe words (being upon the land): "*Euſtace*, ſtand forth; I do here, *reſerving* an "eſtate for my own and my wife's life, give thee *theſe my lands* and "BARTON, to thee and thy heirs." The queſtion was, If this was a good feoffment to *Euſtace*?—COKE, *Attorney General, for the plaintiff.* There are two points to be conſidered: Firſt, If this ſhall inure as a

"*for my own and my wife's life, give thee theſe my lands and* BARTON, *to thee and thy heirs.*"—Adjudged (on a writ of error) not to be a good feoffment; for that an uſe cannot ariſe by *parol*. Ante, 279.

feoffment

CALLARD *against* CALLARD.

feoffment to the uſe of *Thomas Callard* and his wife for their lives, and after to the uſe of *Euſtace* and his heirs; or if it be an immediate feoffment, and the reſervation void? Secondly, If it be not a feoffment, if the words ſpoken, being in conſideration of marriage, the uſe ſhall ariſe out of the poſſeſſion of *Thomas*, and ſhall execute by the ſtatute of uſes, although it be without deed?—FIRST, It ſeemeth that it is a good feoffment, and the uſe ſhall ariſe upon it, although *the words reſervant* are firſt; for ſo the Court is to conſider it, to make all to ſtand together; and in 22. *Eliz.* between *Hare and Barton*, it was adjudged, that where one giveth lands to *J. S.* reſerving a rent to the feoffor and his heirs, *habendum* to the feoffee and his heirs; the reſervation being before the *habendum*, yet the feoffment being by indenture, it is well enough; for the law ſhall marſhal it according to the intent. So here it ſhall be intended as following, and to ſhew the intent of the parties, and not to make it all void.—SECONDLY, Admitting that the reſervation is repugnant, and it can be no feoffment, yet the uſe ſhall ariſe and execute by *parole*; for it is out of the ſtatute of enrollments; for this doth not hinder the raiſing of any uſes, but only upon bargains and ſales, which ſhall not execute by bargain and ſale, but by indenture enrolled; but all other uſes are at the common law, which ariſe upon conſideration upon marriage, &c. But he did agree that an uſe ſhall not ariſe upon general words, or words ſpoken *in futuro*, but *in præſenti*; as to ſay, "If you do "ſuch a thing, I will give you my land." But upon words ſpoken adviſedly, and by reaſon of a valuable and great conſideration, and ſpoken *in præſenti*, as, "I do here, &c." which is an immediate gift. And he had ſeen the record of the caſe 12. *Eliz. Dyer*, 296. and the words were upon communication of a marriage to be had; "I will aſſure after my death *Old-Acre* to "my ſon," it was ruled no uſe ariſeth: and the reaſon ſeemeth to be, that the words were ſpoken *in futuro*; and therefore if one ſaith to his ſon, in conſideration he is his ſon, "I do give thee "my manor of *D.*" this is ſufficient to raiſe an uſe; for they being words ſpoken with adviſement, and for conſideration, it ſhall be intended a gift of the land.—GAWDY. I have not ſeen any book, that at the common law a uſe ſhall ariſe by *parole*, but in a bargain and ſale which is by reaſon of the conſideration given for the land, and that is the reaſon that a fee doth paſs without the word *heirs*; and in this caſe an uſe ſhall not ariſe; for it appeareth his intent was to paſs the land by way of feoffment, when he ſaith, "Stand forth, I do here give thee this land, &c." which is void by way of feoffment, for the reſervation preceding it is repugnant to the livery, for it cannot inure *in futuro*.—FENNER. The reſervation is void, and it ſhall inure to *Euſtace* preſently; and an uſe by parole upon good conſideration is ſufficient.—CLENCH. It ſhall inure as a feoffment to the ſon, and an uſe ſhall ariſe to the father, &c. and ſo the intent of all the parties ſhall be obſerved.

Plowd. 303. 2. Roll. Abr. 7. 782. Hob. 170. Moor, 544. Co. Lit. 48. 2. Com. Dig. 569. 2. Bac. Abr. 487. 1. Wood's Con. 502. Gilb. Uſes, 65. 114. Dougl. 26.

At another day it was moved again: and POPHAM ſaid, they were all reſolved that judgment ſhall be given for the plaintiff (who claimed under *Euſtace*); and being moved to ſhew the reaſons of their judgment, they would not (*a*).—But GAWDY ſaid, he was clear of opinion that an uſe ſhall not ariſe by parole.—POPHAM and FENNER ſaid, they were clear of

(*a*) See S. C. Popham, 47. where the reaſons for this opinion are given.

CALLARD *againſt* CALLARD.

a contrary opinion; and POPHAM ſaid, that 7. *Edw.* 6. it was adjudged, that an uſe may riſe by parole, and he could ſhew the record of it. FENNER ſaid it was a good feoffment, but would ſay no more. And it was adjudged for the plaintiff (*a*),

(*a*) Sed vide S. C. Moore, 687. 2. Anderſon, 64. where it appears that the judgment was reverſed on a writ of error to the exchequer chamber. See alſo 2. Roll. Abr. 788. 1. Vent. 140. 1. Sid. 26. 82. Hob. 170. Co. Lit. 48. 2. Com. Dig. 569. 2. Bac. Abr. 487.—By 29. Car. 2. c. 3. all eſtates created by livery and ſeiſin only, not put in writing and ſigned by the parties, ſhall be eſtates at will.

CASE 27.

Bold *againſt* Bacon.

Qu. If an action for ſlandering another's title will lie if the words are oblique and argumentative, and may by poſſibility be true? Ante, 197. Poſt. 427.

Cro. Jac. 163. 284. 484. 2. Leon. 112. 3. Leon. 177. Ray. 4. 1. Sid. 16. 1. Co. 77. 4. Co. 18. Allen, 3. 1. Roll. Rep. 244. 407. Moor, 410. 187. Daliſ. 103. Yelv. 80. 88. Cro. Car. 140. 4. Burr. 2422.

ACTION for ſlandering his title. And declared, that whereas *William Bacon*, brother of the defendant, had married one *Iſabel*, and died, and afterwards the plaintiff married her; and whereas the plaintiff and the ſaid *Iſabel*, as in her right, were ſeiſed of divers lands as well freehold as copyhold in fee; and had made a ſurrender of the copyhold to the plaintiff and his heirs; and of the freehold had levied a fine to the uſe of the plaintiff and his heirs; and that whereas the plaintiff intended, and had offered to ſell the ſaid land for payment of his debts, &c. and had offered them to *J. Cleyburne* in ſale; the defendant, well knowing the ſame, and envying the eſtate of the plaintiff, and to ſlander his title to the premiſes, ſaid theſe words: "She," *innuendo* the wife of the plaintiff, "was never the lawful wife of my brother "*William Bacon*, for ſhe was married before to one *Nicholas* "*Killingtree*, who is yet alive; which marriage is fully to be "proved, and hath been already as fully proved as any other "marriage can be proved:" and that by reaſon of theſe words none would buy the land, &c. to his damage of 300 pounds. Upon not guilty pleaded, it was found for the plaintiff, to his damage twenty pounds.—And it was now moved in arreſt of judgment, that upon the matter the action lieth not; for that which is alledged is no ſlander; for it may be that *Killingtree* was married to her *infra annos nubiles*, and they afterwards diſagreed, or that a divorce was had between them for this cauſe; and then although *Killingtree* be alive, yet it might be a lawful marriage with *William Bacon*, and by conſequence with the plaintiff; and ſo is no direct ſlander.—GAWDY and CLENCH conceived the action lieth; for the action is brought for ſlandering his title, and not his perſon; and the law intends it was a good marriage with *Killingtree*; and no divorce was, except the contrary be ſhewn; and thoſe that heard the words knew not if a divorce was.—FENNER *contra*. This action lieth not but by reaſon of the prejudice in the ſale; and this appeareth not, for upon a ſurrender or fine by a *feme covert*, ſhe is examined; and it is good till the *baron* doth defeat it, which appeareth not here; and an action doth not lie for ſlander but when it is expreſs, and not by argument; and here it is by way of argument, for that *Killingtree* was married to her and is alive, and ſo may be collected that ſhe is not the lawful wife of the plaintiff; and the ſurrender and fine not good.—POPHAM agreed. Firſt, Becauſe it was ſaid it was by way of argument, and all the words may be true, and yet ſhe may be the lawful wife of the plaintiff; for it may be ſhe was re-contracted to the plaintiff, and afterwards married to *Killingtree*, and then to *Bacon*, and he died;

and then divorced from *Killingtree*, and married to the plaintiff; and ſo there may be an evaſion of the concluſion. Secondly, Here is no direct ſpeech, but *oblique*; and an action lieth not but for words *directly ſpoken*; and cited *Anne Davis' Caſe*, 4. *Co. f.* 17. So if *J. S.* hath land by deſcent, and ſells it to *J. D.* and he offers to ſell it to *B.* and one ſaith to *C.* (in common diſcourſe) that *J. S.* is a baſtard, and this cometh to the ears of *B.* yet *J. D.* ſhall have no action, for it was not ſpoken directly to ſlander the title of *J. D.* but *oblique* this is no ſlander: but if he had ſaid to *B.* "Take heed how you buy the land, for *J. S.* was a baſtard," action lieth; for it was directly ſpoken to that purpoſe, to ſlander the title.—*Et adjournatur.*

BOLD *againſt* BACON.

Buckhurſt *againſt* Newnton.

CASE 18.

PROHIBITION for ſuing for tithes of faggots of oak and elm, *cautelè* making his libel for faggots which were of beech and thorn. The defendant prayed a conſultation, *ita quòd* he ſhould not meddle with the faggots of oak and elm, for otherwiſe the party that maketh the faggots may *per cautelam* put in a ſtick of great wood into the faggots, and ſo prejudice the parſon of all the tithes of the reſidue.—But THE COURT ſaid, if it be ſo, the party muſt ſhew the ſpecial matter *pro conſultatione habendâ*, that the oak and elm are ſo intermixt, that he cannot do otherwiſe; and pray a conſultation as to that which was thorn and beech. And ſo it was done in *Molyns' and Dawes' Caſe*, where ſuch a ſpecial conſultation was granted upon ſuch ſpecial plea: but as it is, he can have no conſultation for any part.

Tithes are not payable for faggots of *beech and thorn* intermixed with the lopings of *oak and elm.*

Yelv. 119. 2. Leon. 79. 1. Roll. Ab. 637. Mar. 58. 64. 2. Inſt. 621.

Pannel *againſt* Fenn.

CASE 19.

Michaelmas Term, 35. & 36. *Eliz. Roll* 26. *or Hilary Term* 36. *Eliz. Roll* 56.

TRESPASS. Upon ſpecial verdict the caſe was, *John Fenn* was poſſeſſed of a leaſe for years; and having iſſue *John* and *George* his ſons, and *Margaret* his daughter, maketh *George* and *Margaret* his executors; and deviſeth his term to his executors until ſuch time as all his debts and legacies be paid, and that they ſhall have levied all charges they ſhall be put unto by any ſuit touching his will, or by any other means in the due execution of his will. The reſidue of his term then unexpired, he deviſed to *John* his ſon, and the heirs of his body; and afterwards to *George* and his heirs; and dieth. The executors enter generally into the lands, and *Margaret* ſells the term to the plaintiff; and afterwards *George* ſells it to the defendant; and *John* dieth without iſſue: and they further find that the debts are not paid. The queſtion was, If *George* and *Margaret* take this term as a legacy, or as executors? and ſecondly, If the general entry be an execution of the legacy?—As to the firſt, THE JUSTICES reſolved, if they take it as a legacy, then the plaintiff and defendant are tenants in common, and then an action of treſpaſs doth not lie; for although the defendant, who had the eſtate of *George*, doth not plead the tenancy in common, but pleads not guilty; yet this appearing to the Court by the verdict, the action lieth not: but they all reſolved they do not take as a legacy, but as executors; for no more is given to them by the will, than the law giveth to them as executors; then the deviſe is void, and they take as executors; for it being given to them until debts

A. makes *B.* and *C.* his executors, and deviſeth to them a term of years until all debts, legacies, and charges are paid. Each of them have an entire authority; and either of them may grant the term to a ſtranger.

1. Roll. Abr. 618. 924. Moor, 350. Gould. 185. Dyer, 23. 21. *Hen.* 7. pl. 25. 28. *Hen.* 6. pl 3. Godol. 134. 2. Peere Will. 532.

PANWEL *against* PENN.

and legacies be paid, this the law willeth; and when it is given to them until they be satisfied of the charges they are put unto by the will; this is no more than the law giveth, for by law they are to be satisfied of all such charges, if the charges do not arise by their own default. But admitting the devise be good, yet their general entry doth not execute the term in them as a legacy; for when a particular interest is given, and the residue to another, this entry shall not be an election to take it as a legacy, except there be an express declaration of their intent; for otherwise they shall be charged for the residue as a *devastavit*, which the law will not inforce; but if the entire term be given to the executors, it shall be otherwise, for there is no mischief. And it was adjudged for the plaintiff. *Dyer.* 277. b. *Post.* 386.

Ant. 223. Co. 10. 47. Post. 387. 816.

CASE 20.

Stich *against* Wisedome.

"I *think* he is a "horse-stealer" are actionable words.

ACTION for these words: "Many an honester man has been "hanged; and a robbery hath been committed, and I think "he was at it; and I think he is a horse-stealer." It was moved after verdict, that an action lieth not without an express averment he was so.—CURIA *contra*. They are a great slander, if the defendant sheweth not a good cause of his thinking. And it was adjudged for the plaintiff.

CASE 21.

Nichols *against* Badger.

If words are too general, no action lies.

ACTION for these words: "Thy credit hath been called in "question, and a jury being to pass upon it, thou "foistedst in a jury early in the morning; and the lands thou hast "are gotten by lewd practices."—It was adjudged that no action lay, for the words are too general.

Mo. 428.

CASE 22.

Banks *against* Stacy.

"*Thou art forsworn*" is slanderous, altho' the oath is not alledged.

ACTION for these words: "Thou art a forsworn jack in the "court of *A*. Thou didst swear away twenty shillings from *B*." and avers that the court of *A*. was a court-baron.—And the plaintiff had judgment, although it was not shewn between what persons or in what action he was sworn.

Ante, 297. 342. 1. Hawk. P. C. ch. 69. s. 3.

CASE 23.

Colt *against* How.

Trinity Term, 36. *Eliz. Roll* 897.

Covenant that "he his execu-"tors and as-"signs" would repair. An assignment of the breach must allege that neither he nor his executors nor his assigns did repair.

COVENANT. For that the defendant by indenture did covenant, that he and his executors and assignees would repair a mill, let to the defendant; and alledgeth, that the mill was defective in reparations, and the defendant his executors and assignees did not repair it. And it was demurred upon the declaration, because he did not alledge that he *nor* his executors or assignees did not repair it; for if any of them did repair it, the action doth not lie; and it ought to be alledged in the disjunctive, not in the conjunctive.—And of that opinion was THE COURT, that the breach was not well assigned; and though this fault was not assigned by the demurrer, yet he shall take advantage of it. But upon the motion of the Court, the defendant waived his demurrer, and the plaintiff amended his plea, and the defendant pleaded to issue.

1. Mod. 42. 67. 223. 1 Vent. 114. 5. Mod. 133. Salk. 139. 1. Strange, 199. 594. Ld. Raym. 1898. 366. 8. Mod. 238. 1. Wood's Con. 428.

Weeks

Weeks' Case.

CASE 24.

ACTION for these words: "*Weeks* assaulted me and others, to "have robbed us; but we were too strong for them, and "escaped."—Adjudged actionable, for if one saith that *J. S.* lay in wait to do a robbery or murder, an action lieth, though no felony was done.

Words actionable. Moor, 409. Ante, 6.

Berry *against* Greene.

CASE 25.

TRESPASS. Upon special verdict the case was, A copyholder surrenders to the use of *J. S.*; the lord without reasonable cause refuseth to admit him. The question was, If he might enter without admittance?—And THE COURT held clearly he could not enter, unless there be a special custom to warrant it; for after the surrender and before admittance, he who maketh the surrender continueth in possession, and not the lord or *cestuy que use*, and he shall have trespass against any that enters; as if a copyholder surrenders to the use of his will, yet it is clear he shall have it during his life: so in the principal case, *cestuy que use* shall not enter nor have action before admittance.

The surrenderee of a copyhold cannot enter or support an action before admittance, though the lord refuse admittance without cause.

Yelv. 144. 1. Bulst. 200. 1. Ro. Ab. 502. 3. Lev. 385. 2. Roll. 264. Co. Lit. 62. a. Cro. Car. 283. Cro. Jac. 403. 3. Bulst. 218. 238. 1. Vent. 261. 2. Wilf. 14. 162. 1. Burr. 206. Gilb. Ten. 290. 1. Term Rep. 261. 2. Term Rep. 198.

Atterton *against* Harward.

CASE 26.

ACTION upon the case. And declareth, that a *capias ad satisfaciendum* upon a judgment was awarded against the defendant to the sheriff of *Suffolk*, who directed his warrant to the plaintiff as his bailiff to serve it, and that the plaintiff assumed to the sheriff to save him harmless against all escapes; and that by force of the warrant he arrested the defendant, and the defendant, intending to make the plaintiff to be charged, escaped, for which the plaintiff in the first action brought an action against *J. Colt*, then sheriff, upon this escape, and recovered; and *Colt* brought an action against the now plaintiff upon his *assumpsit*: and for this *tort* he brought his action. Upon not guilty pleaded, it was found against him. And it was moved in arrest of judgment, that there is no sufficient cause in the declaration to maintain an action; for although the sheriff may have an action of the case against the prisoner who escapes, as it was adjudged in *Hilt and Holt's* case, yet the bailiff shall not have it.—And of that opinion was THE COURT, for the bailiff was not chargeable to the sheriff by law, but by his *assumpsit*; and this being his voluntary act, shall be no cause to charge the defendant, but shall only make himself chargeable. But they agreed, if the bailiff had been chargeable by law, without such promise, an action did lie for him against the defendant, who caused him to be charged.

A *bailiff* cannot maintain an action against a defendant for an escape in consideration of his having promised to save the sheriff harmless against it. Ante, 53. Cowp. 403. Dougl. 40. 1. Term Rep. 418.

Watkinson *against* Man.

CASE 27.

UPON special verdict the question was, If a lease made by a prebend is good by the 23. *Hen.* 8. c. 28 for he is not seised *in jure ecclesiæ sed præbend.*?—And it was adjudged good, for a prebend is not excepted, but only parsons and vicars, and being not excepted, he is as bishops. POPHAM said, in *Dr. Dale's Case*, for a house *juxta Paul's*, is was so adjudged, and so had been twice adjudged in his experience. And FENNER said, it was so adjudged in the case of a treasurer of a church.

A prebend is within the enabling statute of 32. *Hen.* 8. c. 28. Co. Lit. 44. b. 4. Leon. 51. 1. Lev. 112. 3. Bac. Ab. 335. 1. Wood. Con. 189.

Michaelmas

Michaelmas Term,

36. and 37. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Francis Beaumond, *Eſq.*
Thomas Walmſley, *Eſq.* } *Juſtices.*
Thomas Owen, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir T. Fleming, *Knt. Solicitor General.*

CASE 1.

James Apharry *againſt* Roger Bodingham and the Petit Jury.

In an action againſt an heir, the averment of "*aſſets by diſcent*" ſhall not be defeated by a conveyance made by the anceſtor "to "the uſe of "himſelf for "life, remain-"der to his *firſt* "and every "other *ſon* in "tail, remain-"der to himſelf "in fee, with "power to "make leaſes, "and *revoke* "*uſes*," provided the jury find it to be fraudulent.
Ante, 326.
Poſt. 355.
5. Co. 36.
10. Co. 80.
2. Com. Dig. 578.
Cowp. 474. 705.

ATTAINT on the 23. *Hen.* 8. c. 3. For that the *petit jury* at the aſſizes at *Hertford* gave a verdict for *Bodingham*; and aſſigned the *faux ſerement* in this: That whereas *R. Bodingham* brought debt againſt *J. Apharry* as heir to *G.* his father, he pleaded "*riens per diſcent, unde debitum prædict. ſolvere potuit, &c.*" to which the ſaid *R. Bodingham* replied, that he had by diſcent, *viz.* at *Suſ.* in the ſame county; and iſſue was taken upon it. Evidence was given that certain lands in *S.* did deſcend to him as ſon and heir to his father; but he ſhewed a deed indented made in 27. *Eliz.* between himſelf of the one part, and *Walwin* and others of the other part, by which he covenanted for natural affection, &c. to ſtand ſeiſed of the land to the uſe of himſelf for life, remainder to his firſt ſon in tail; and ſo to his other ſons, the remainder in fee to himſelf, in which there was a clauſe to give power to make leaſes, and to revoke the uſes; and the *petit jury*, notwithſtanding this conveyance, conceiving it to be fraudulent, and ſo void by the 13. *Eliz.* c. 2. did find that he had aſſets.

NOTA. The action brought by *Bodingham* was 33. *Eliz.* long time after the conveyance made by *Apharry*; but it was proved that the plaintiff *Apharry* had notice of the obligation before the making of the conveyance.

GLANVILE *for the defendant.* Notwithſtanding this conveyance, the remainder that is limited to his right heirs is his ancient reverſion; and this he had by diſcent; and the iſſue being, that he had *riens per diſcent*, and he having this reverſion by diſcent, the iſſue is found againſt him, though the conveyance had been *bona fide.*

But to that it was anſwered, that the iſſue was, that he had nothing by diſcent, *unde debitum prædict. levari poteſt*; and although he had this reverſion by diſcent, yet it being a reverſion upon an eſtate in tail, it is not extendible for this debt:—*Quod fuit conceſſum* PER CURIAM, *abſente* ANDERSON.

It was then moved by the counſel of the plaintiff, that this is no fraudulent conveyance within the 13. *Eliz.* c. 5. (for it is clear that the 27. *Eliz.* c. 4. (*a*) doth not touch it) for a conveyance by the 13. *Eliz.* c. 5. muſt be made by the debtor, and not his heir or any other; for the heir is not a debtor in reſpect of his perſon, but in reſpect of the land.

(*a*) *Quære*, If copyholds are within this ſtatute?
Cowp. 705.

WALMSLEY. It ſeemeth that it is within the ſtatute, for the heir is a debtor; which is proved by the writ againſt him, which is in the *debet et detinet*, whereas an action againſt the executors is in the

the *detinet* only, and ſo it is within the intent of the ſtatute: but the grand jury may find it ſpecially, if they will.—To this OWEN and BEAUMOND did conſent, that the conveyance of the heir ſhall be fraudulent as a conveyance by the father, who is the principal debtor; and ſo they conceived it clearly.—But the *grand jury* gave a general verdict, and affirmed the firſt verdict. APHARRY *againſt* BODINGHAM.

NOTA. When the grand jury was ſworn, the Juſtices demanded of the crier what manner of oath he gave to them, for the oath ought to be ſpecial: but SCOTT *the prothonotary* ſaid, it ought to be general to try the iſſue in the attaint; to which the other clerks agreed. Oath in attaint.

Anonymous. CASE 2.

QUARE IMPEDIT. It was reſolved, if there be two parſons of one church, and each of them hath the entire cure of the pariſh, and both the benefices of the value of eight pounds *per annum*, one of them dieth, and the other is preſented, this is a plurality within the 21. *Hen.* 8. c. 13. and is within the intent of the ſtatute, that none ſhall have two livings or benefices with cure. If two parſons of one church have each an entire cure, and one is preſented to both cures, it is a plurality.

Jackman *againſt* Hoddeſdon. CASE 3.

TRESPASS. Upon not guilty pleaded, the jury being at the bar, the queſtion was upon the forfeiture of a copyhold in *Layton Buſſard*, by reaſon of a leaſe for years made by a copyholder. And it was held PER CURIAM, that a leaſe for years of copyhold land by indenture or parol is a forfeiture, unleſs there be an expreſs cuſtom to warrant it.—And thereupon it was ſhewn on the part of the copyholder, that there were leaſes made by indenture, 27. *Hen.* 8. and divers times ſince, ſome twenty, and ſome forty years ſince, of copyhold land of that manor. But THE COURT held that was not ſufficient, for they are of too late time to prove a preſcription, which ought to be from time whereof, &c. A leaſe for years made by a copyholder unwarranted by the cuſtom; or a refuſal to pay the lord a reaſonable fine; are forfeitures of the eſtate. Poſt. 499. 779. 1. Roll. Abr. 507. Co. Lit. 59. b. Gilb. Ten. 234. Dougl. 725.

And THE COURT held, that a wilful refuſal to pay a fine is a forfeiture, if the fine demanded by the lord be reaſonable, where the fine is arbitrable at his will, and the jury is to try whether it be reaſonable or not. And the cuſtom of the manor was here ſhewn to be, that the lord was to ſeize the land till fine was made with him for it; which was held a reaſonable cuſtom.

And upon evidence it was held, that if a tenant be amerced, and dieth before the lord hath levied it, that it is loſt, for it is *quaſi actio perſonalis*.

Vaughan *againſt* Comitem Bedford, the Biſhop of London, and Gainsford. CASE 4.

QUARE IMPEDIT, for the church of *Littleton*.—It was held PER CURIAM upon evidence, that a corporation may be known by two names; and if it hath been ſo known from time, &c. a grant made by either of the names is good. A corporation may be known by two names. 1. Lutw. 519.

Lyne *againſt* Backhouſe. CASE 5.

ACTION for theſe words: "He hath beaten me and taken away "my purſe, and twenty ſhillings in money."—It was held PER CURIAM, that the words are not actionable (*abſente* ANDERSON); for it may be intended he took it as a treſpaſſor, for he chargeth him not with felony. Words importing a treſpaſs only are not actionable.

Underhill

Case 6.

Underhill *againſt* Jo. Brooke and Margaret his Wife.

Divorce may be pleaded to an action againſt huſband and wife, and it ſhall be ſuppoſed to have continuance. 1. Term Rep. 5. 10.

DEBT againſt them as executrix of the former huſband upon an obligation of two hundred pounds. The defendants by *J. G.* their attorney plead, *viz.* "*prædict. Johannes et Margareta* by their "attorney plead, that they were divorced before the writ purcha-"ſed." It was thereupon demurred in law: *Firſt*, Becauſe it was not alledged that the divorce did continue, for it may be it is repealed.—*Sed non allocatur.* For it ſhall be intended to continue, if the contrary be not ſhewn.

(*a*) Lut. 24. Barnes, 224. 334.

Secondly, Becauſe they plead as *baron* and *feme*, "*et prædict. Jo-"hannes et Margareta*," and that after imparlance (*a*).—*Sed non allocatur*, for they do not plead *et prædict. Johannes et Margareta uxor ejus*; for then it ſhould be an eſtoppel; but they plead according to good form: and it was adjudged that the writ ſhould abate.

Case 7.

Deux *againſt* Jefferies.

If a man covenants, "*that he* "*will never* "*ſue*," it is a releaſe; but "*that the obli-*"*gor ſhall not* "*be ſued before* "*ſuch a feaſt*," is a covenant. Co. Lit. 246. 9. Co. 52. b. 1. Roll. Abr. 939. Show. 47. 331. 4. Bac. Abr. 101. 266. 1. Lord Raym. 420. 2. Salk. 575.

DEBT upon an obligation. The defendant pleads, that the plaintiff by indenture, &c. did covenant that he would not ſue the bond before *Michaelmas*, and thereupon demanded judgment, *ſi actio, &c.* intending, that the action being ſuſpended for that time, was gone for ever. It was thereupon demurred, and argued by FLEMING *for the plaintiff*, and by DREW *for the defendant*, and 21. *Hen.* 7. 24. 4. *Hen.* 7. 6. were cited.—But THE COURT without further argument reſolved for the plaintiff, for it is only a covenant, and ſhall not inure as a releaſe; and it is not to be pleaded in bar, but the party is put to his writ of covenant, if he ſued before the time. But if it had been a covenant that he would not ſue it at all, there peradventure it might inure as a releaſe, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a releaſe. And it was adjudged for the plaintiff.

Case 8.

Pipes' Caſe.

Aſſumpſit in conſideration of having become bail, muſt alledge before *whom* bail was taken.

ASSUMPSIT. And declareth, that whereas the defendant was arreſted for ſurety of the peace, in conſideration the plaintiff would be bail for him, he did aſſume, &c. and alledgeth *in facto*, that he became bail for him, but ſaith not before whom.—And this matter after verdict being alledged in arreſt of judgment, it was held to be good cauſe of ſtaying it, by WALMSLEY and BEAUMOND; for the conſideration ought to be preciſely alledged to be performed; and therefore he ought expreſsly to have alledged before whom he entered into bail, that it might appear he had authority to take bail. *Sed adjournatur.*

Case 9.

Samms *againſt* Foſter.

Where the cauſe of juſtification is local, the defendant muſt traverſe every other place, as well as that laid in the declaration. Co. 8. 124. Poſt. 803. 1. Saund. 312. Ant. 110.

ACTION of trover and converſion of an ox-hide of the plaintiff's in *Middleſex*. The defendant pleaded, that the city of *London* is an ancient city, and that there is a cuſtom there, that *ſi aliquis extraneus forinſecus è libertate ejuſdem civitatis* buy any thing *de alio forinſeco è libertate prædict.* that it ſhould be forfeited to the mayor and commonalty of the ſaid city; and ſaith, that the plaintiff *extraneus è libertate* did buy the ſaid ox-hide of another foreigner, whereupon he ſeized it in *London* to the uſe of the mayor, &c. ABSQUE HOC that he did find it, and convert in *Middleſex*.

And

And it was thereupon demurred.—GLANVILE argued *for the plaintiff:* Firſt, That it was not a good or lawful cuſtom (*a*); and in proof thereof cited the caſe 36. *Hen.* 6. of jewels of the king's ſold; and 21. *Hen.* 7. *pl.* 40. 3. *Eliz. Dy.* 186. *and* 246. And the form of the pleading he ſaid is not good, viz. *ſi aliquis extraneus è libertate*; but doth not ſhew where the liberty is: and the traverſe is not good; for he ought to traverſe every county beſides *London*, and not *Middleſex* only.—ANDERSON and BEAUMOND conceived the form of the pleading to be ill; but for the matter of the cuſtom itſelf they doubted.—OWEN ſaid the cuſtom was good (*b*), and had been allowed before theſe times. *Et adjournatur.*

SAMMS *againſt* FOSTER.

Doct. Pla. 361. 367. Cro. Car. 45. 372. Noy, 57. Cowp. 175.

(*a*) This cuſtom is explained and confirmed by charter. 20. *Hen.* 7. Vide Priv.

Lond. 19. 104. (*b*) Co. Lit. 282. b.

Taverner *againſt* Dominum Cromwell.

CASE 10.

TRESPASS. The caſe upon demurrer was, Divers copyholds were granted by one copy, and ſeveral *habendums* and ſeveral *reddendums* for every of them; but they all began at one time, and were to end at one time. The copyholder committed waſte in one of the copyholds. The queſtion was, Whether that ſhould be a forfeiture of them all?—Secondly, For this copyhold wherein the waſte was done, which was cutting down trees, the copyholder preſcribes, "that every copyholder of that parcel of "woodhath uſed to cut down trees there growing." The queſtion was, If ſuch a preſcription for one copyholder only was good?—Thirdly, Whether the not coming to the court upon ſummons at the church be cauſe of ſeizure?

If ſeveral copyholds are held by ſeveral tenures, waſte in one of them is a forfeiture of that eſtate only, tho' they were all granted by the ſame copy.

1. Roll. Ab. 507. 4. Co. 27. a. 2. Leon. 109. Gilb. Ten. 246, 247. Ld. Raym. 1000.

FOR THE FIRST, all THE JUSTICES reſolved that they are ſeveral grants, and as ſeveral copies, and the forfeiture of the one is not the forfeiture of the other; and the ſeveral *habendums* and *reddendums* make them ſeveral in themſelves, although they be all by one copy. *Vide* 4. *Co.* 27. a.

FOR THE SECOND, they held the preſcription good. For WALMSLEY ſaid, there is a difference between a preſcription for freehold land and for cuſtomary land; for cuſtom which concerneth freehold ought to be throughout the county, and cannot be in a particular place, 45. *Aſſiſe.* But a preſcription concerning copyhold land is good in a particular; for *de minimis non curat lex*; and the law is not altered thereby; and it may be there is but one copyholder there, for which he might *preſcribe.*—BEAUMOND agreed to this difference, and cuſtom to have a profit *a prender*, *privilege*, or *diſcharge*, may very well be in a particular. And by OWEN it was ruled accordingly in *Collis's Caſe* in the queen's bench.

A preſcription for *one* copyholder is good. Poſt. 390. 4. Co. 31. b.

FOR THE THIRD, they conceived it to be no cauſe of forfeiture; for it ſhall not be a forfeiture but upon refuſal to perform his ſervices, or a wilful non-payment of the rent, or wilful abſence from court: but in this caſe it may be he had no notice of the ſummons, and knew not of the court; for the ſummons properly is to be to his perſon, or at his houſe; or it ought to be averred, he had notice thereof.

It is no cauſe of forfeiture for a copyholder to diſobey a general ſummons of the court in the church. Poſt. 506.

And exception was taken to the ſummons, becauſe it was but four days before the court; whereas it ought to be fourteen days at the leaſt.—And of that opinion was WALMSLEY. But the other JUSTICES were againſt him therein; for they ſaid the ſummons was well enough for the time. And it was adjudged for *Taverner* the copyholder. *Vide Coke's Entries*, 272. & 288.

Co. Ent. 288. 1. Roll. Ab. 507. 1. Leon. 104. Cro. Car. 217. Gilb. Ten. 230.

Case 12.

Bach *againſt* Oneſly.

Eaſter Term, 33. *Eliz. Roll* 409.

If the conuſee of a reverſion upon a leaſe for years enter and ouſt the leſſee before attornment, and then make a feoffment of the land, after which the leſſee re-enter; the feoffee cannot maintain an avowry for rent in arrear after the feoffment and re-entry.
Ante, 264.
Poſt. 832.
Co. Lit. 319.
5. Co. 113.
6. Co. 68.
Owen, 23.
2. And. 15.
1. Stra. 109. 112.
Cowp. 702.
Dougl. 23. 279.

REPLEVIN. The caſe upon demurrer was, That one *Roger Cooper* made a leaſe for years to the plaintiff, and afterwards levied a fine of the reverſion to *Noke*, who before attornment entered and ouſted the leſſee, and enfeoffed the avowant; the plaintiff re-enters, and for rent arrear after the feoffment, and re-entry, the defendant avoweth: and the queſtion was, If the avowry were maintainable?—And after divers arguments at the bar, it was reſolved this Term by WALMSLEY, BEAUMOND, and OWEN, that the avowry was not maintainable for want of attornment; for as the conuſee himſelf could not avow without attornment, no more ſhall he that claims in the *per* from him as his heir or aſſignee; for as the folly of the conuſee (who might have had a *quid juris clamat*, and compel the tenant to attorn) ſhall prejudice himſelf, ſo it ſhall his feoffee: but the lord of a villein, or he who cometh in by eſcheat, ſhall avow without attornment; for they come in in the *poſt*, and no folly can be intended in them.—And WALMSLEY ſaid, the reaſon that an attornment ſhall be upon a fine is, becauſe the tenant is not to take conuſance of every fine, until it be notified to him, by bringing a *quid juris clamat*, or a *per quæ ſervitia*; and therefore it is not reaſon that he by his re-entry ſhall be compelled to take conuſance of the fine, and enforce him to attorn, who otherwiſe was not by law compellable; for the law will not compel him to take notice of a feoffment by the conuſee, who is *quaſi* a ſtranger to him: but there is ſo great privity between the leſſor and leſſee, that he ought at his peril to take notice of acts done by the leſſor upon the land, whereof by intendment he cannot be ignorant; but of acts done by a ſtranger, the law enforceth him not to take knowledge. And the caſe of *Littleton*, that a re-entry ſhall be an attornment, is *quaſi* a maxim and reaſon of law; for otherwiſe it is very hard, and ſhall not therefore be conſtrued ſo largely, as to extend to the feoffment of another; for it may be the leſſee was beyond the ſea, or in priſon, at the time of the feoffment, and therefore no equity is given to this maxim, wherein is no exception: and therefore they held that the avowry was not good, for want of attornment. But they in their arguments did conceive, that if in this caſe the conuſee had deviſed the reverſion and died, or had died without heir, ſo as the reverſion had eſcheated, that the deviſee or lord might have avowed without attornment.—And it was adjudged for the plaintiff, 5. *Co.* 113.—NOTE. *Thwayte's Caſe* in the court of wards was cited to be ruled by the advice of the Juſtices, that where a reverſion was granted, and before attornment, the grantor made a leaſe for years, that attornment afterwards cometh too late.

By 4. & 5. Ann. c. 16. it is enacted, "that all grants and conveyances of any "manors or rents, or of the reverſion or "remainder of any meſſuages or lands, ſhall "be good without attornment of the te-"nants; provided that no ſuch tenant ſhall "be damaged by payment of rent to any "ſuch grantor or conuſor; or by breach of "any condition for non-payment of rent "before notice given him of ſuch grant by "the conuſee or grantee. And by 11. Geo. 2. "c. 19. attornments of tenants to ſtrangers "claiming title to the eſtate of their land-"lord ſhall be null and void." But this does not extend to attornment made to mortgagees after the mortgage is forfeited, &c.

Pethouſe

Pethouſe *againſt* Crane et Alios.

CASE 12.

TRESPASS. The caſe upon demurrer was, Tenant for life remainder in tail, remainder to the right heirs of the tenant for life; the tenant for life acknowledged a ſtatute, and dieth; the tenant in tail dieth without iſſue: the queſtion was, If the right heir of the tenant for life be bound by this ſtatute, and the land liable in his hand (*a*)?—And all THE JUSTICES conceived, that the land is liable, for the right heir hath it by diſcent; as the caſe 5. *Edw.* 4. *pl.* 2. where ſuch a tenant for life granted a rent-charge: and if the tenant for life had granted the remainder over, as he might, the grantee ſhould have held it charged. *Sed adjournatur*, and was not adjudged this term.

A ſtatute acknowledged by *tenant for life* ſhall bind his *heir* on the diſcent of the land, by the death of the remainder-man in *tail* without iſſue.

Ante, 350.

1. Co. 104. a. and the caſes there cited.

(*a*) See 3. & 4. Will. and Mary, c. 14.

Freeſton *againſt* Standford et Alios.

CASE 13.

TRESPASS. The defendant pleadeth, that the place *where* is called *White-Acre*, &c. and that it is his freehold. The plaintiff replieth, that the place *where* is called *Black Acre*, *alius quàm in barrâ*. The defendant rejoineth, that the *Acre* mentioned in the bar, and the *Acre* mentioned in the replication, are one, and not divers. And it was thereupon demurred.—And adjudged without argument to be no plea; for it is repugnant to ſay they are both one, when the plaintiff by his replication hath affirmed upon record that it is another; for when he ſaith *alius*, it cannot be *idem*: and ſo are 14. *Hen.* 8. *pl.* 4. 27. *Hen.* 8. *pl.* 7. And WALMSLEY ſaid, it was ſo adjudged 28. *Eliz.* Wherefore it was adjudged for the plaintiff.

Repugnancy in pleading.

See Poſt. 492. 812. 897.

5. Bac. Ab. 214.

Hollingworth *againſt* Aſcue.

CASE 14.

Eaſter Term, 35. *Eliz. Roll* 1255.

DEBT upon an obligation of 300l. The defendant demanded *oyer*; and upon entry *in hæc verba*, it appeared that it was a ſtatute ſtaple of 300l. acknowledged by the defendant and two others before the mayor of *Lincoln*: but becauſe the ſeal of *Lincoln* annexed thereto was not a ſeal of two pieces, according to the form of the ſtatute of *Acton Burnell*, it had been ruled before betwixt theſe parties, that it was not a ſtatute ſtaple (but void as a ſtatute ſtaple); wherefore he now brought his action of debt as upon an obligation at the common law: and it being hereupon entered, the defendant pleaded, that it appears that two others were bound jointly with him, who are yet alive, and not named. Judgment *ſi actio*, &c. againſt him only. Upon this plea it was demurred.—HARRIS, *ſerjeant*, argued *for the defendant*, that the writ ſhould abate, becauſe they three are jointly obliged, and none of them without the other can be ſued; as 4. *Hen.* 7. and 17. *Eliz.* are. Alſo debt cannot be brought upon this ſtatute; for being void as a ſtatute, it cannot be brought as upon an obligation: and debt lies not upon a ſtatute ſtaple; as appears by 4. *Edw.* 4. 5. *Edw.* 2. "*Debt*," 167.—OWEN, *Juſtice*, held, that the action lay; for he doth not declare upon the ſtatute, but he declares that he was bound by obligation: and when you ſay that you and two others acknowledged a ſtatute unto him, that is not any anſwer unto him. Alſo, the plea is not in abatement, becauſe it is not averred that the other two did enſeal

A ſtatute ſtaple by *two obligors* which is void as a ſtatute for want of the formalities required by the act of parliament may be ſued againſt *one obligor*, in an action of debt as on a bond.

Ante, 7. 319. 321. 397.

Poſt. 461. 494. 544.

Moor, 405. Gould. 137. Lut. 696. 1. Saund. 291. 1. Sid. 238. 1. Vent. 34. 2. Mod. 242. Strange, 503. 1. Peer. Will. 337. Shep. Touch. 56.

Hollingworth *against* Ascue.

seal and deliver it as their deed; for otherwise it shall not be intended but that the now defendant sealed and delivered it only: and so is the course of pleading, as appears in 28. *Hen.* 6. and 17. *Eliz.*—Beaumond *accord. in omnibus*; for a defendant shall not take advantage of a joint bond, unless he avers that the others delivered it also: and that debt lies upon a statute, or it is extendible, at the election of the party.—Walmsley. The statute compriseth two things: by the words "*teneri et obligari*," it is an obligation: by the words "*concessit quòd levetur de terris*," it is a statute whereupon debt may be brought.—Anderson, *Chief Justice*. Debt may be brought upon a statute staple or merchant; for the words "*obligari et teneri*" make it an obligation, although it be not a statute to some intent: and by delivery of the party it is an obligation; but not a statute until the mayor's hand be thereto: and a delivery may be without words of delivery; as it hath been adjudged, that one made a release, and cast it upon the table, and said, "There, this will serve," this is a good delivery. And to aver that the other two delivered it, he conceived it to be needless; for it shall be intended to be so if the plaintiff doth not shew the contrary. Wherefore, &c. *Et adjournatur*.—But afterward in the next Term it was adjudged for the plaintiff, that debt well lies upon the statute as upon an obligation; and it shall not be intended that the others sealed it without averment, &c. And a writ of error was brought, which is yet depending (*a*).

Ante, 319.

9. Co. 137. a. Ante, 7. Co. Lit. 36. a.

(*a*) See the continuation of this case, post. 451.; and its conclusion, post. 494, 495.

Case 15.

Sacheverel *against* Bagnoll.

Waste must be brought in the *tenet* or *tenuit*; but this action will not lie by a remainderman in tail against the husband of a tenant for life after her death; and if it did, he may plead that he delivered the deed of feoffment to uses to the plaintiff, in satisfaction.

Waste. The plaintiff counts, that one *Elizabeth Bingham* was seised in fee, and by deed enfeoffed *Sir Gervise Clifton* and others in fee to the use of the said *Elizabeth* for life, and after to the use of *Eliz.* her daughter for life, remainder to the plaintiff in tail; that *Elizabeth* the feoffor died, and *Eliz.* the daughter took the defendant to husband, who committed waste, and his *feme* died; and for that waste done during the coverture this action was brought; and it was not brought in the *tenet* nor *tenuit*. —Wherefore for this cause the Court held the writ to be ill.

The defendant pleads in bar (confessing all the matter precedent) a concord and satisfaction, *viz.* that the feoffees gave and delivered unto him the deed of feoffment to uses, which he delivered to the plaintiff in satisfaction of the waste, &c. And it was thereupon demurred, and argued by Savell that it was not any plea. —First, Because it is an action founded upon a statute, and in the realty, wherein concord is not any plea; and in proof thereof relied upon 1. *Hen.* 7. and 13. *Hen.* 7. where it is held, that concord is not any plea.—Secondly, Because the concord alledged is by the delivery of a deed to the plaintiff which belonged unto him, and so it cannot be any satisfaction; as 33. & 38. *Hen.* 6. a deed of the gift of intail to the issue in tail cannot be any satisfaction. So 9. *Edw.* 4. and 19. *Eliz. Onely's Case*, accord upon this reason. Wherefore, &c.—Warberton *è contra*. First, the writ of waste is not *tenet* nor *tenuit*, and therefore it is not good, because it is variant from the form of the *Register*; for it ought to have been the one way, and to make his count special.—And of that opinion was the Court, that for this cause the writ was ill; as also because the writ supposeth, that the *baron fecit vastum*;

1. Roll. Ab. 128. 266. 2. Roll. Ab. 31. 833. 5. Com. Dig. 676.

vaſtum; whereas the *baron* being charged as tenant in right of his *feme*, the writ ought to have been *fecerunt vaſtum*; for ſo is the form in the *Regiſter*; and ſo is *Natura Brevium*. And to this opinion THE COURT agreed, the form alſo of the writ was ill for this cauſe; for in debt againſt them, for debt of the *feme's*, it ſhall be *debent*, &c. THE COURT alſo conceived, that the writ lies not againſt the *baron* for waſte committed by him in the time of his *feme*; for he is to be charged by reaſon of his *feme*, and jointly with her; and ſhe being dead, the action is gone; for it is but a perſonal wrong done by her. But the prothonotaries informed the Court, that an action of waſte hath been brought againſt the *baron* for waſte done in the life of the *feme*; and the writ was, *quod tenuit in jure uxoris*; and it hath been maintained. But the Court ſaid, they greatly marvelled at it. *Vide* 10. *Hen.* 8. *pl.* 11.—But for the matter all THE COURT reſolved, that it was a good bar, admitting that the action lies; for it is in its nature perſonal; for damages only are to be recovered, and not the place waſted: and, in every action perſonal, concord with ſatisfaction is a good plea; and therefore in an attaint, concord is a good plea (*a*): but where land is to be recovered by a writ of waſte, it may peradventure be otherwiſe; as 11. & 13. *Hen.* 7. *et* 10. *Eliz.* 2. *Dyer*, 277. are. And here the delivery of this deed is good matter of ſatisfaction; for the deed did not appertain to *ceſtuy que uſe*, but to the feoffees by the common law; and the ſtatute doth not transfer it unto him; then by conſequence the gift by the feoffees to the defendant is good, and the delivery thereof by him to the plaintiff is good ſatisfaction. And WALMSLEY cited, that it was adjudged in one *Ekin's Caſe*, wherein he was of counſel, that the deed appertained to the feoffee, and not to *ceſtuy que uſe*. Wherefore it was adjudged for the defendant.

SACHEVERELL *againſt* BAGNOL.

Poſt. 462. 2. Ro. Ab. 834. 5. Co. 75. b. Co. Lit. 54. a. 9. Co. 78. b. (*a*) 13. *Edw.* 4. pl. 1. 6. Co. 44. Dyer, 73. Ante, 194. Poſt. 476. 2. Ro. Abr. 31. Cro. Jac. 217. 342.

Hill *againſt* Hart.

CASE 16.

WASTE. A ſpecial verdict was found, that the plaintiff had but a third part of a reverſion, in common with two others: and, Whether he ſhould have waſte, the others not named? was the queſtion; for it was ſaid that this action is *quaſi* in the realty.—But THE COURT held, that the action lies not for one tenant in common ſole; for damages, and the place waſted, are to be recovered by moieties or a third part: it is alſo inconvenient that the third part ſhould be recovered and delivered in execution.—But it was moved, that this matter of tenancy in common ought to have been pleaded; otherwiſe the defendant ſhall not take advantage thereof; for the iſſue here was joined upon a collateral matter, *viz.* upon the deviſe of a reverſion, &c.—But THE COURT ſpake not thereto. *Sed adjournatur.*

Quære, If one tenant in common can bring an action of waſte, without naming his co tenants? Moor, 388. Co. Lit 197. b. Cowp 219. 1. Term Rep. 759. a.

Brown *againſt* Peys.

CASE 17.

TRESPASS. Upon a ſpecial verdict the caſe was, *John Warners* was ſeiſed of the manors of *Warners* and of *Church-hall*; and deviſed the manor of *Warners* to the eldeſt ſon of his couſin *Richard Foſter* in fee; and deviſed the manor of *Church-hall* to one *Margery Waters* for life, remainder thereof "to ſuch of my couſin "*Richard Foſter's* children as ſhall then be alive and have the "manor of *Warners*;" and died. The eldeſt ſon of *Richard Foſter*,

A man having two manors deviſes the manor of *X.* to the eldeſt ſon of *A.* in fee; the manor of *Y.* to *B.* for life, with remainder "to "ſuch of *A.*'s children as ſhall then be alive and have the manor of *X.*" The deviſee of *X.* enters and aliens; and then *B.* dies, living the eldeſt ſon of *A.* the manor of *Y.* ſhall go to the heir of the deviſor. Co. Lit. 27.

entered

Brown against Pers.

entered into the manor of *Warners*, and aliened to *Lord Rich* in fee. Afterwards *Margery Waters* died, the eldeſt ſon of *Richard Foſter* then living. And, Whether he ſhould have the manor of *Church-hall*, or any other of the ſons of the ſaid *Richard Foſter*; or, Whether the heir of the deviſor ſhould have it? was the queſtion.—WARBERTON, *ſerjeant*, argued for the plaintiff, that the eldeſt ſon of *Foſter*, notwithſtanding that he had aliened the manor of *Warners*, ſo as he had it not at the time of the death of *Margery*, yet by the intendment of the will ſhould have the manor of *Church-hall*; for the words of the will being, "and if ſhe die, any of my couſin "*Foſter's* children then living which ſhall have the manor of "*Warners*, he to have the manor of *Church-hall*," are words demonſtrative to ſhew, that he who ſhould have the manor of *Warners* ſhould have the manor of *Church-hall*; and the party is ſufficiently ſhewn, although he had aliened the manor before: as 15. *Eliz. Dyer*, 323. deviſe to *Jane* his daughter was good, although ſhe were a baſtard. So *Hil.* 30. *Eliz. Ret.* 336. in the queen's bench, betwixt *Chapman* and *Thomſon*, a man deviſed lands which he had bought of one *Kingſmill*, who had ſold it to another, and he to the deviſor, yet it was a good deviſe; and although he had aliened it, yet he is the party who had it: as tenant in dower, or

Co. Lit. 54. a.

tenant by the curteſy, although they alien their eſtates, yet they ſhall be ſued in waſte: and if in this caſe the eldeſt ſon had been diſſeiſed or evicted from the manor of *Warners*, it is not reaſon he ſhould loſe the benefit of *Church-hall* alſo. Wherefore, &c.—But all THE COURT, after argument on all ſides, reſolved to the contrary: for in wills the words ought to be obſerved as near to the intent as may be; and therefore the deviſe being "to one of "*Richard Foſter's* children," his child's child ſhall not have it; for it is out of the words. It ought alſo to be ſuch a child as then ſhould have the manor of *Warners*; for there are two deſcriptions who ſhall have it, and both of them ought to meet together at the time of the deviſe executed; otherwiſe he ſhall not take thereby: *viz.* he ought to be a child, and ſuch a child as then ſhould have the manor of *Warners*; for his intent was, that both manors ſhould go together. Therefore it was adjudged accordingly for the defendant.

CASE 18.

Wright *againſt* Moorhouſe.

Michaelmas Term, 35. & 36. *Eliz. Rell* 517.

Words which touch a man in his office and credit are actionable. Ante, 306. Cro. Car. 14. 223. 4. Co. 16. 3. Lev. 280. Cro. Jac. 240. 2. Ro. Ab. 48. 8. Mod. 270. Salk. 695. Stra. 420. 1158.

ACTION for theſe words: "Before the plaintiff came to the "ſervice of the Merchant Taylors, he dwelt in *Shrewſbury*, "and ſet the town together by the ears; and ſo long as he was "there, they were never in quiet; but afterwards they lived quietly: "and he being clerk to the Merchant Taylors, was of conſent and "counſel with *W. Goodlaw* to deliver the books of the corporation which he had in his keeping, to the intent that thereby "ſome of the lands of the ſame corporation might be found concealed.—It was thereupon demurred, Becauſe that for none of theſe words an action lies.—But, after argument, THE COURT reſolved for the plaintiff; for theſe words touch him in his office and credit; for his office is an office of truſt, and theſe words touch him therein. ANDERSON ſaid, If one ſaith to a counſellor, "Thou didſt diſcloſe my counſel;" or to a juſtice of peace, "Thou art a falſe," or, "a lewd juſtice," or, "Thou dealeſt "corruptly," or, "Thou doſt not adminiſter true juſtice," an action lies. BEAUMOND ſaid, if one ſaith to a counſellor or attorney, "Thou didſt deliver my evidence to my adverſary," an action lies. Wherefore it was adjudged for the plaintiff.

Sir Edward Cleer *againſt* Peacock and Others.

CASE 19.

QUARE IMPEDIT. The plaintiff declares, that *Sir Richard Fulmerſtone* was ſeiſed of the advowſon of *D.* in fee; and deviſed it for ten years, remainder to *Sir Edward Cleer* in fee. The defendant by his bar confeſſed the deviſe for years; but that the deviſe was after to *Sir Edward Cleer* and his *feme*, and their heirs, upon ſuch condition, that if they did not ſuch an act their eſtate ſhould ceaſe; and that it ſhould be to the defendant; and ſhews the breach, &c. Whereupon it was demurred. Firſt, Becauſe the plaintiff entitles himſelf by a deviſe in fee abſolutely; and the defendant pleads a deviſe unto him and his *feme* upon condition, and takes not any traverſe. Secondly, that by a will an eſtate in fee cannot be limited to ceaſe, nor a remainder to be limited over (*a*). Thirdly, it was moved, Whether there may at this day be a deviſe of an advowſon in groſs?—HARRIS, *ſerjeant*, argued, that the bar was not good without a traverſe; and in proof thereof relied upon 19. *Hen.* 6. 13. To the ſecond, that the condition is void; for an eſtate in fee cannot ceaſe upon ſuch a limitation, nor another eſtate riſe thereby; nor can an eſtate of inheritance be limited to ceaſe; as 2. & 3. *Phil. & Mary*, 127. 11. *Hen.* 7. 6. and *Scholaſtic. Caſe:* but there the eſtate deviſed was an eſtate tail; and therefore differs from this caſe, 28. *Hen.* 8. 33. To the third, that it is not deviſable; for it is not valuable, nor within the intent of the ſtatute.

An advowſon in groſs. held in *capite*, is a valuable hereditament, and deviſable by the ſtatute of wills.

(*a*) Ante, 30. Cro. Jac. 592. Dyer, 33. 1. Eq. Caſ. Ab. 187. 2. Vezey, 420. Poſt. 361.

DREW, *è contra*. Firſt, that the bar is good without traverſe; for when the *baron* ſurvived, he might plead it as a deviſe made unto him ſole; 17. *Edw.* 4. *pl.* 7. 35. *Hen.* 6. *pl.* 38. Secondly, An eſtate in fee, as well as an intail, may determine upon a limitation; and agreed that a remainder cannot be limited upon an eſtate in fee determined, but upon an eſtate determinable upon a limitation it may. Thirdly, it is deviſable; for it is an hereditament, and lies in tenure; as 5. *Hen.* 7. 37. & 43. & 31. are: and it is valuable; for it is aſſets in a *formedon*. Wherefore, &c.

Co. Lit. 18. a.

Ante, 142. 205. Poſt. 361.

THE JUSTICES ſpake not to the two firſt points; but to the third, ANDERSON conceived clearly, that it is not deviſable; for it is out of the letter and intent of the ſtatute; for a deviſe ſhall be but of ſuch things which are departible, and of an annual value; for the queen ought to have the third part thereof, or the third part of the value thereof; and this is not partible: and although it may be holden, and is aſſets in a *formedon*, yet it is not aſſets in debt; for it is not of an annual value, and ſo cannot be deviſed. So it is of liberties and common *ſans number*; they cannot be deviſed, becauſe they be not departible. And ſo it was agreed in *Lord Monjoy's Caſe*, for the manor of *C.* that neither cuſtoms nor liberties in groſs are deviſable.—But WALMSLEY, BEAUMOND, and OWEN held, that it is well deviſable; for the body of the act is, that lands, tenements, and hereditaments may be deviſed; and this is an hereditament; and there is not any mention therein that it ſhall be of things valuable: nor is there any mention of value, but in the ſaving; and that is, that the queen ſhall have the third part, or the value of the third part, which may well be; for it is not of neceſſity that they ſhould be things of annual value which ſhould be deviſable: and an advowſon is an hereditament departible, as betwixt ſiſters; and dower ſhall be thereof (*a*); and it is valua-

Co. Lit. 374. b. 3. Rep. 32. 10. Rep. 81. 2. And. 22. W. Jones, 17. 23. 27. Hob. 303. 1. Vez. 223. 422. 1. Atk. 619. 621. 3. Atk 640. 3. Bro. Par. Caſ. 557. 2. Vern. 748. 2. Bl. Rep. 1240. Powel on Dev. 220.

(*a*) Perk. 343. F. N. B. 148. Co. Lit. 52. 379. Cro. Jac. 621. 691. 3. Leon. 155.

SIR EDWARD CLEER *againſt* PEACOCK and OTHERS.

ble, *viz.* twelve-pence in the pound; as 12. *Hen.* 8. *pl.* 8. and other books are. And the ſtatute ſhall be well ſatisfied; for of things valuable the queen may have the third part or value of them; and if they be not valuable, the third part, howſoever they be: and it is clear, that an advowſon appendant, and liberties appendant to land are deviſable, as thoſe which are ariſing out of the land; and a reverſion upon an intail, whereunto no rent is annexed, is deviſable, yet it is not of any annual value. *Sed adjournatur.*

CASE 20.

James Cogan *againſt* Catherine Cogan.

Eaſter Term, 38. *Eliz. Roll* .

A. ſeiſed in fee let to *B.* for life, remainder to *C.* for life, "*provided*, that if "*A.* ſhould "have a ſon "which ſhould "live to the "age of five "years, the "eſtate limited "to *C.* ſhould "ceaſe, and the "land remain "to that ſon in "tail."—The eſtate limited to the ſon is void; becauſe limited on a condition which was to defeat the preceding remainder to *C.* 11. *Hen.* 7. pl. 6. 13. *Hen.* 7. pl. 23. Ante, 205. Cor: 361. t. Co. Lit. 218. a. 224. a. 378. a. Noy's Max. 123. Sect. 720. 1. 2. And. 138. 1. Ro. Ab. 407. 472. 474. Plowd. 25. h. 28. d. 32. 4. Ba. Ab. 319. Dougl. 265. 508. 758.

TRESPASS upon demurrer. The caſe was, That *John Cogan* was ſeiſed in fee, and let it to *Robert Cogan* for life, remainder to *Catherine* the defendant for life: "PROVIDED, That if *John*, "the leſſor, had iſſue a ſon during his life, who ſhould live to "the age of five years, that the eſtate limited to the defendant "*Catherine* ſhould ceaſe; and it ſhould remain to the ſaid ſon in "tail." The leſſor had iſſue the plaintiff, who attained his age of five years: and, Whether the remainder limited to the defendant ſhall ceaſe, and the remainder limited to the plaintiff were good or not? was the queſtion.

After the *Serjeants* had argued the caſe, it was reſolved by THE COURT for the defendant. For ANDERSON ſaid, there are certain rules in law touching remainders, *viz.* that a remainder ought to paſs at the firſt by the livery, and ſhall not take effect with a condition precedent; nor ſhall begin upon ſuch a condition: and although *Colthurſt's Caſe* gives colour thereto, and that the remainder in queſtion ſhall be good; yet he held not that caſe to be law in this point; for a remainder depending upon a condition precedent is merely void: and further in this caſe, an entry is requiſite to avoid the remainder for life; for a freehold cannot determine without the ceremony of entry; but otherwiſe it is of a leaſe for years. Wherefore this remainder, depending upon a limitation which is againſt the rules of law, is void.

WALMSLEY to the ſame intent. The remainder is void by *Littleton*, and by the ancient grounds of a law; for the remainder (by *Littleton*) ought to paſs at the time of the livery; and the nature of a livery is a *giving*; and there cannot be a *giving*, but there ought to be one to take *in præſenti*, or *in expectancy*; ſo as the law ſhall preſerve it in the *interim*; and there needs not be any deed of a remainder, which proves that it paſſeth by the livery; and by *Richild's Caſe*, the remainders ſhall take effect when the particular eſtate takes his effect; and ought to paſs preſently by the livery, or otherwiſe will never paſs: and although in *Colthurſt's Caſe* the condition be precedent in words, yet it is ſubſequent in reaſon; wherefore it may be well maintained by law: and a remainder cannot paſs by contingency; for then there would an abſurdity follow, *viz.* there ſhould, by the firſt livery, be an immediate reverſion expectant upon the remainder for life; and afterward this remainder ſhall be turned out, and the reverſion alſo; and a new remainder and reverſion ſhould come in place of them; ſo as there ſhould be turnings out and turnings in at ſeveral times, by one livery which was made at one time. But

as

as touching the ceasing of the estate in remainder, he conceived it might very well be without any entry by the operation of law, the particular estate remaining in being. Wherefore, &c. COGAN *against* COGAN.

BEAUMOND to the same intent. For a remainder ought to begin and be created with the first livery, and concurrent with the other estate; and cannot afterwards begin upon a condition. And he said, he never had heard or read, that a *proviso* could create a remainder; although it might determine a remainder: but he held, that a remainder of an estate of freehold or inheritance cannot cease without entry or claim, no more than an estate of freehold in possession.—OWEN agreed with BEAUMOND *in omnibus*, for the reasons before specified.—Wherefore it was adjudged for the defendant. Post. 379. Ant. 359.

Dawbridge *against* Cocks.

CASE 22.

TRESPASS. The question was, Whether a copyholder might lop off the boughs without special custom?—And it was resolved PER CURIAM, that by the common law he may cut off the under boughs, which cannot cause any waste: but the amputation of the top boughs will cause the putrefaction of the whole tree. Wherefore this is waste, as well as the decapitation thereof, &c. A copyholder may lop, but not destroy the trees of his estate. Ant. 5. 1. Brownl. 132.

Paulter *against* Cornhill and Others.

CASE 22.

EJECTIONE FIRMÆ.—Upon evidence it was held, that the husband shall not be tenant by the courtesy of a copyhold, unless there be an express custom to warrant it.—It was also held by all THE COURT, that if a copyholder surrender in tail, and the heir of the donee is to bring a *formedon*, he ought to count of the gift made by the copyholder who surrendered, and not by the lord; for he is but the instrument to convey it, and nothing passeth from him. A husband cannot be tenant of a copyhold by curtesy except by special custom. Post. 442. 582. 4. Co. 27. Gilb. Ten. 158.

It was also moved, Whereas the surrender was to the use of one in fee, upon condition to pay 100l. to a stranger; and if he failed, that it should be to the use of a stranger in fee; whether that were a good limitation to the stranger, so as there should be a fee dependant upon a fee?—THE COURT spake not much hereto, but willed to have it specially found; yet BEAUMOND conceived it to be good enough: for it shall be as an use limited upon a feoffment; and these uses shall rise out of the first surrender (*a*). 1. And. 192. 2. Leon. 109. 208. 1. P. Will. 69. Ld. Raym. 630. 1145. (*a*) Ante, 359. Gilb. Ten. 162.

Fourthly, Whether in this case (upon the tender of the 100l. to a stranger, and he refusing) the condition be saved, forasmuch as it is to be done to a stranger.—BEAUMOND. There is difference where one is obliged to do an act to a stranger, and he refuseth, the obligation is not saved, for he takes upon him to do it, and where a lease, or feoffment, or surrender is made as here, upon such a condition, for herein it is otherwise.—But the Court moved, that it should also be specially found. Ante, 399. Post. 694. Co. Lit. 209. Gilb. Ten. 276.

Archer *against* Green.

CASE 23.

FORMEDON. The tenant pleads a fine with proclamations in bar, by one *Richard*, the demandant's ancestor. The plaintiff replies, that *Richard* entered upon his father, being tenant in tail, and levied the fine; and before the proclamations passed, the father re-entered, and died, &c.—And by THE WHOLE COURT it A re-entry before the proclamations have passed, will destroy the fine. Dougl 483.

was

ARCHER *againſt* GREEN.

3. Co. 90. Ant. 122.

was held to be a good replication, and the bar well avoided. For when the father re-entered before all the proclamations paſſed, the fine thereby is avoided to all purpoſes; as well to himſelf as to the ſon who levied it. But if the proclamations had incurred before his entry, although he had re-entered within the five years and died, yet it ſhould have bound the ſon and his heirs for ever.

CASE 24.

Strowd *againſt* Willis.

Michaelmas Term, 36. & 37. *Eliz. Roll* 312.

In debt on bond conditioned for the payment of rent reſerved upon a demiſe according to certain articles, the defendant is eſtopped to ſay he had not any thing in the land demiſed by the articles. Ante, 122. Poſt. 756. 769. 1 Roll. Ab. 872. 2. Roll. Ab. 454. Co. Lit. 47. Poph. 114. Owen, 110. Moor, 405. Cro. Jac. 312. 2. Co. 33. b. Allen. 52. 1. Leon. 156. 1. Salk. 277. Stra. 610. 818. 3. Bac. Ab. 441. Dougl. 159. 1 Term Rep. 86. 201. 2. Term Rep. 171.

DEBT upon an obligation, conditioned for the payment of 37l. 10s. rent, reſerved upon a demiſe of copyhold land for forty years, according to ſuch articles indented. The defendant pleaded, that he had not any thing in the land demiſed by the ſaid articles. It was thereupon demurred.—SAVELL, *for the plaintiff*. He is concluded by the recital of the obligation, and alſo by the articles, 5. *Hen.* 7. *pl.* 20. Againſt a leaſe by indenture, the leſſee ſhall not ſay, that the leſſor had nothing to let; and by a bare recital in an obligation, one ſhall be eſtopped; as 13. *Edw.* 4. *pl.* 4. is. And a recital by a ſingle bill ſhall eſtop the party. 25. *Edw.* 4. *pl.* 54. a recital by an obligation, that he made a will, he is eſtopped to ſay the contrary; and 2. & 3. *Eliz. Dyer*, 190. accord.—DREW, *to the contrary*. For where one is obliged to pay rent, if he cannot enjoy the land, he is not bound to pay it; and therefore 14. *Edw.* 4. *pl.* 4. 20. *Hen* 6. *pl.* . 22. *Hen.* 6. *pl.* 57. the tender thereof ſhall be upon the land, and not to the perſon. 21. *Hen.* 7. *pl.* 6. *the Dean of Windſor's Caſe*, it is ruled, that if he cannot enjoy the land, he ſhall not pay the rent. And as to the eſtoppel by the recital, there is a difference where it goes in the generality, and where in the particularity; for where it is in the generality; as to infeoff one of all the lands deſcended unto him, or to be non-ſuited in all actions depending in the common pleas; he ſhall not be eſtopped to ſay, that he hath not any land, or that he hath not any action depending there, 18. *Edw.* 4. *pl.* 4. Againſt a condition to perform all covenants, a man may ſay, that there were not any covenants; and 21. *Hen.* 4. *pl.* 54. agrees with this difference.—And of this opinion were all THE COURT at the firſt; but afterwards, upon a ſecond argument, they conceived that he ſhould be eſtopped. Wherefore it was adjudged for the plaintiff.

CASE 25.

Agnes Fowler *againſt* Dale.

Hilary Term, 36. *Eliz. Roll* 42. *or* 421.

"*Inhabitants*" cannot preſcribe to have a right of common. Ante, 180. Poſt. 441. 1. And. 51. Sav. 81. 2. Leon. 44. Godb. 96. Owen, 4. Gouldſ. 33. 6. Co. 59. Cro Jac. 154. 2. Bl. Rep. 927.

REPLEVIN. The defendant made conuſance as bailiff of *Sir Thomas Hatton*, the place *where*, being part of the manor of *Benyfield*; and that the vill of *Benyfield* is an ancient vill; and that in the ſaid vill *habetur talis conſuetudo, et a tempore quo, &c. habebatur, &c. quod quilibet inhabitans in aliquo antiquo meſſuagio* within the ſaid vill, ſhould have common in the ſaid waſte for all his beaſts *levant et couchant* within the ſaid vill; and that he was an inhabitant, &c. And iſſue was joined upon this preſcription, and found for the plaintiff; and it was moved in arreſt of judgment, that it was a void and ill preſcription for every inhabitant to preſcribe, &c. and therefore the bar was ill; and the iſſue being joined upon an ill bar, the plaintiff is not to have any judgment.—YELVERTON moved for the plaintiff to have judgment;

ment; for it is pleaded by way of cuſtom and uſage, and it is not a preſcription, which may be well enough; for common may be as well by reaſon of inhabitancy, as otherwiſe. And 22. *Hen.* 6. *pl.* 43. common may well be appendant to an houſe; ſo it is 10. *Hen.* 7. *pl.* 24. 15. *Edw.* 4. *pl.* 32. It is ſaid there is not any difference betwixt common appendant, and common by reaſon of inhabitancy; ſo as it is there admitted, that there may be common in reſpect of inhabitancy. FOWLER *againſt* DALE.

It hath been objected, that inhabitants are not perſons able to preſcribe. But it was thereto anſwered, that it is not here alledged to be in the perſon, but to be the uſage of the village. *Vide* 18. *Hen.* 8. 11. *Hen.* 6. *Prior of Dunſtable's Caſe*, 7. *Edw.* 4. *pl.* 24. 15. *Edw.* 4. *pl.* 29. 18. *Edw.* 4. *pl.* 3. 20. *Edw.* 4. *pl.* 10. *and ſecond* "*Mariæ*, "*Præſcriptio*," *Bro.* 100. Inhabitants cannot preſcribe; but a cuſtom may be alledged, that inhabitants may have common. Wherefore, &c. Ant. 184.

ANDERSON. It hath been adjudged lately in this court, that it is a void and idle preſcription, and I can ſhew the roll thereof; and there is not any colour againſt it, for an inhabitant cannot have common, if he hath not an intereſt or eſtate therein: and this is not ſhewn in ſuch a preſcription; wherefore it is not a good preſcription. Alſo if he be ouſted thereof, he hath not any remedy nor action for it, but the lord who is the owner thereof; and therefore the intereſt ſhall not be taken from the lord; and the lord and the inhabitants cannot both have intereſt therein. Co. 6. 60. a.

WALMSLEY. Such a preſcription cannot begin at this day, and therefore continuance cannot make it good: for a grant of common *inhabitantibus* cannot be good, becauſe they are not any corporation; and by preſcription it cannot be good, for it is in nature of a purchaſe; and an inhabitant cannot purchaſe to himſelf and his ſucceſſor. Ant. 35.

BEAUMOND. This is not any of the four commons, *viz.* appendant, appurtenant, in groſs, or vicinage; wherefore it is no good common.

OWEN *accord.*; for they are not any corporation to preſcribe: but a freeholder may alledge that he is ſeiſed, and that he and all thoſe, &c. have had common, and that is a good preſcription. Co. 6. 60. b. —But all THE JUSTICES held, that uſage may be alledged by reaſon of an inhabitancy to have an eaſement, but not to have inheritance. Ant. 180.

ANDERSON. It is the common courſe throughout *England*; and it is abſurd and *oppoſitum in objecto*, that the common ſhould be in the inhabitant; for it ſhould be miſchievous to take it by a preſcription from the owner of the ſoil. And it is not poſſible that ſhould be good by uſage, which cannot have a lawful continuance. And cuſtom and preſcription are all one. Wherefore, &c.—*Sed adjournatur.*

Jeſop *againſt* Payne, *Parſon of Upway.* CASE 26.

PROHIBITION prayed for ſuing for tithes of locks of wool, ſuggeſting, that he paid the tenth fleece of wool in ſatisfaction for all locks, and tithes due for wool. A *modus* to pay the tenth fleece, in lieu of locks and tithes of wool is good.

DREW moved, that the preſcription was not good; becauſe it is but to have the ſame thing and of the ſame nature in recompence. Poſt. 446. 475. 609. 660. Dougl. 204.

Jesop *againſt* Payne.

pence. And it hath been ruled in the queen's bench, to give the tenth ſheaf in ſatisfaction of the tithe of the corn, and rakings, is not ſufficient to maintain a prohibition. And there in 33. *Eliz.* in the caſe of *Shakerly againſt Sir James Marvin*, it was held, that it was not any preſcription to have cocks of hay for all tithe-hay. —The Court held, that in this caſe the ſubſtance of the preſcription was good enough, and agreed to the caſe of the rakings; for that is as good corn as any other, but locks be not of the ſame value with the fleece. But in regard of a fault in the ſuggeſtion, that it was not, "that they uſually had paid, &c." which is iſſuable, it was not good. And therefore they held that conſultation ſhould be awarded.

Case 27.

Charnock *againſt* Sir Thomas Gerard.

An *audita querela* lies in the common pleas upon a *ſtatute ſtaple*.

AUDITA QUERELA. For that the conuſee upon a ſtatute ſtaple had purchaſed part of the land, and the plaintiff another part, and yet had cauſed the plaintiff's lands to be extended and delivered in execution. And it was held to be a good cauſe for an *audita querela*.—It was then moved to have a *ſuperſedeas* to ſtay execution; for although they were extended, yet they were not delivered by *liberate*. And the Court doubted, becauſe it was upon a ſtatute ſtaple, which was not returnable in this court, but in the chancery: but it well may be upon a ſtatute-merchant; for that is always returnable in this court. But the prothonotaries ſaid, that an *audita querela* lies well in this court, in this caſe; and a *ſuperſedeas* ſhould be awarded, as it was in the caſe of *Lord Dudley*; and divers other precedents accorded therewith. Whereupon the Court afterwards reſolved, that it well lay here, and a *ſuperſedeas* was thereupon awarded.

Case 28.

Stainfield and his Wife *againſt* Viſcount Bynden.

Michaelmas Term, 35. & 36. *Eliz. Roll* 1434.

An aſſignment of dower by commiſſion *de dote aſſignanda* out of the court of wards, is no bar to dower at the common law, for the writ muſt iſſue from the chancery.

Dyer, 363. Co. Ent. 173. 2. Mod. 18. F. N. B. 263. 2. Inſt. 18. 2. Brownl. 126. Co. Lit. 38. 9. Co. 16. 7. Mod. 43.

DOWER. The tenant pleads in bar, that the wife of the demandant was endowed by commiſſion out of the court of wards *de dote aſſignanda*, which ſhe accepted, and demanded judgment *ſi actio*, &c. It was thereupon demurred.—And after argument by the *ſerjeants*, the Court reſolved for the demandant; for they conceived, although the 32. *Hen.* 8. c. 46. for the authority to the court of wards, yet the authority of the chancery is not tranſmitted to the court of wards: for the marriage ought to paſs under the great ſeal; the office ought to be always returned into the chancery; the livery ſhall be always ſued out of the chancery; and all other acts (ſaving the ſurvey of the wards, lands, and letting it for years) ſhall be in the chancery, and not in the court of wards; and therefore an aſſignment by commiſſion out of the court of wards (*a*) is void, and ſhall not bind him, and no act there ſhall bind the heirs; or any other men's inheritance: but this dower ought to have been aſſigned out of the chancery by a writ *de dote aſſignanda*; and if it be evicted, the record ſhall be tranſmitted into chancery, and there ſhe ſhould be endowed *de novo*. Wherefore it was adjudged for the demandant.

(*a*) Aboliſhed by 12. Car. 2. c. 24.—See 3. Bl. Com. 258.

Hilary

37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

Weſbys *againſt* Skinner and Catcher, late Sheriffs of London. CASE 1.

Hilary Term, 34. *Eliz. Roll* 169.

DEBT upon an eſcape. Upon *nihil debet* pleaded, a ſpecial verdict was found, that the priſoner for whoſe eſcape the action was brought, was in execution in the counter at the ſuit of one *Dighton* for 200l. and at the ſuit of the plaintiff for 440l.; that the defendants *in exitu ab officio* delivered him as in execution for one cauſe only, *viz.* at the ſuit of *Dighton* to the new ſheriffs, and they ſuffered him to eſcape. For this eſcape the action was brought againſt the ancient ſheriffs; and, Whether upon this matter the action lies againſt the defendants, or ought to be brought againſt the new ſheriffs, becauſe the *tort* began firſt in them? was the queſtion.

An old ſheriff muſt deliver over to his ſucceſſor by indenture all the priſoners in his cuſtody charged with their reſpective executions; and if he omit any, it will be deemed an eſcape.

TANFIELD. The new ſheriffs are chargeable; for there is not any law to compel the ancient ſheriffs to deliver the priſoners by indenture with their cauſes; but the new ſheriff ought at his peril to take notice eſpecially of executions, which are upon and out of the records; for he ought to be attendant upon every court at *Weſtminſter*, and to have his deputy in every court, whereby he is to be informed of every execution iſſuing out of every court. And in divers caſes a man muſt take notice at his peril of acts, of which by intendment he may have conuſance: as leſſee for life ſhall take notice of livery made upon the land, ſo leſſee for years or for life ſhall take notice of the grant of a reverſion by deed enrolled. And in 16. *Eliz.* it was ruled in one *Wyſe's Caſe*, where a writ of diſcharge was ſhewn in the county court for the ancient ſheriff, who was not preſent, that he ought at his peril to take notice thereof. So executors ought to take notice of every judgment againſt their teſtator: and if in this caſe the ancient ſheriff had died, and a new ſheriff made, he at his peril ought to take notice of the priſoners in execution, and of their cauſes. So here the new ſheriffs, when they found him in execution, and ſo was lawfully under their charge. But if there had not been any cauſe certified of detaining him in priſon, it might peradventure have been otherwiſe; for then, if they detained him in priſon, they ſhould have been chargeable

Co. 3. 71. b. Hob. 266. 2. Roll. Abr. 457. Belſt. 70. 2. Leo. 54. 4. Bac. Abr. 445.

3. Co. 72. b.

Wesby *againſt* Skinner and Catcher.

able in falſe impriſonment. Alſo in this caſe, they ſuffered him to eſcape before *Dighton's* debt was ſatisfied. Wherefore, foraſmuch as he did a *tort* therein, it is reaſon he ſhould the rather be charged therewith.

Ante, 12, 13.

Snagg *è contra*. The ancient ſheriffs are not diſcharged, nor the new ſheriffs charged, until three things be performed, *viz.* the patent to the new ſheriff; the writ of diſcharge to the old ſheriff; and the delivery of the priſoners by indenture to the new ſheriff: and there is a writ in the *Regiſter*, *f.* 295. that the priſoners and writ ſhall be delivered to the new ſheriff by indenture. Wherefore, inaſmuch that it was not done ſo, whereby the new ſheriff might have conuſance, they ſhall be charged, and not the new ſheriff. Wherefore, &c.

3. Co. 72. a.

Popham, *C. J.* and all the Court, Gawdy *abſente*, held, that the ancient ſheriff ſhall be charged, and not the new ſheriff: for this delivery over of the priſoner, and writ by indenture, was by the order of the common law: and reaſon wills, that the ſheriff ſhould not have priſoners delivered unto him, but that he alſo ſhould have the cauſes certified with them; and not to compel him to ſearch out the cauſes of their impriſonment; and in regard there was a default in the old ſheriff, that when they delivered the priſoner by indenture, they ſhewed but one cauſe only of his detainment, and not both. It is therefore reaſonable they ſhould rather be charged than the new ſheriff; and it was an eſcape in them preſently: for the priſoner when he is delivered to the new ſheriff for one cauſe, although he be in execution for one cauſe, he is not of execution for the other: wherefore it is an eſcape *maintenant* in the ancient ſheriff, and they are forthwith chargeable therewith; and the law will never charge the new ſheriff, but where the priſoner is delivered unto him in the common gaol of the county, with the cauſe of his detainment, and he needs not otherwiſe to take him. And therefore in *Dawlridge-court's Caſe* in this court; who being ſheriff of the county of *Warwick*, and had a priſoner in execution (whom he kept in an houſe in *Warwick*, and not in the common gaol of the county) being afterwards removed from his office, would have delivered the priſoner to the new ſheriff at the ſaid houſe, who refuſed to receive him, unleſs he were brought to the common gaol, and afterwards the priſoner eſcaped; it was adjudged, that the ſaid *D.* was chargeable with this eſcape, and not the new ſheriff, unleſs he had been delivered unto him in the common gaol. And as to the caſe where the old ſheriff dieth, that may be agreed to be good law, for it is of neceſſity, becauſe there the new ſheriff was to take notice at his peril. And it was afterwards adjudged accordingly (*a*).

2. Co. 72. b.

Note. Gawdy ſaid unto me, that he was of the ſame opinion clearly, for the inconveniencies which otherwiſe would enſue to ſheriffs, to inforce them to ſearch all records out of every court, and in the interim not to know what to do with their priſoners, *Vide* 5. *Edw.* 4. *pl.* 71. 39. *Hen.* 6. *pl.* 33.

Note. A writ of error was after brought in the exchequer chamber, and after argument there, the judgment was affirmed. *Vide* 3. *Co.* 71.

(*a*) See 3. Geo. 1. c. 15. ſ. 8. and 20. Geo. 2. c. 37.

Stokes

Stokes *againſt* Anneſby. CASE 2.

ERROR to reverſe a judgment in a writ of dower in the common pleas. The error aſſigned was, For that in term *Mich.* 21. & 22. *Eliz. Rot.* 2315. *Anneſby* brought a writ of dower againſt *Stokes*, returnable *quind. Martini*, at which day the tenant made default, and a *grand cape* was awarded returnable *octab. Purificat.* next following; at which day the tenant appeared and tendered his law *de non ſummons*, and had day to make it until *quinque ſeptim. Paſch.* At which 5. *ſeptim. Paſch.* the tenant *jett eſſoyne*, which was adjourned until *tres Trin.* 22. *Eliz.* at which day the tenant appeared, and the demandant releaſed the default. And the tenant imparles until *Mich.* 22. & 23. *Eliz.* And upon the plea-roll, *Paſch.* 22. *Eliz.* it is entered, that the tenants then appeared and pleaded in bar; that the demandant detained charters from him, being feoffee to the *baron*; and iſſue was joined thereupon, which was afterwards tried in *Mich.* 23. & 24. *Eliz.* and found for the demandant; and ſhe thereupon had judgment; and thereupon this writ of error was brought.

Error to reverſe a writ of dower.

THE FIRST ERROR aſſigned was, Becauſe this appearance and pleading in *Paſch.* 22. *Eliz.* at which day the party was out of court, by the eſſoin caſt and adjourned, is merely contrary to the record, and void; and therefore the iſſue joined and trial and judgment thereupon are altogether void.—But COKE *Attorney General*, and GLANVILE, *ſerjeant*, moved, that the eſſoin-roll and all thereupon ſhould be void. For when the party appears, and pleads, that appearance confounds the eſſoin; and that appearance and pleading is upon the plea-roll, which ſhall the rather and more forcibly be intended true than the other roll; for the plea-roll controlls all other rolls.—But after divers arguments, the laſt day of this Term THE COURT reſolved it to be error, for every roll hath his courſe and order. And when it appears that the tenant was eſſoined, and the eſſoin adjourned until another Term, the parties thereby are out of court, and their appearance cannot be recorded. And in that an appearance is recorded, and a plea pleaded upon the plea-roll, it ſhall be intended to be a practice and miſ-entry (as in truth it was, as appeared upon examination) than otherwiſe. Wherefore the firſt ſhall be intended the true roll, and all proceedings ſhall be according to it; and the appearance after, when none of the parties had day in court, is void: and ſo the plea pleaded, and trial, and judgment thereupon, are erroneous, and not aided by any of the ſtatutes of *jeofails*. Wherefore for this cauſe they awarded, that the judgment ſhould be reverſed.

An appearance entered on the plea-roll, after an *eſſoin* caſt on the *eſſoin-roll* and adjourned, is an error not aided by verdict.
Ante, 340.
Cro. Car. 02. Gilb. C. P. 13.

A SECOND ERROR alledged was, That this plea of *detainment of charters* by the feoffee, is a void plea *en ſon bouche* (which was agreed by ALL THE COURT); and then the iſſue joined thereupon is void, and ſo a miſ-trial and *jeofail:* and of that opinion was FENNER, *Juſtice*. But it was thereto anſwered, that although it were an inſufficient plea, yet it is not merely void; for it is a plea proper to this action: and iſſue being joined thereupon, and tried, it

If a tenant in dower, being feoffee, pleads detainment of charters, an iſſue thereupon, is aided, after verdict, by 32. *Hen.* 8. c. 30.
Com. Dig. 331.

Ante, 260. Poſt. 455, 778. 9. Co. 18. a. 1.

STOKES *againſt* ANNESBY.

is aided by the ſtatute of *jeofails*, and not like where *not guilty* is pleaded in debt, or *non detet* in treſpaſs; for thoſe are mere void iſſues in thoſe actions. But the other Juſtices did not ſpeak much thereto, the judgment being reverſed for the firſt cauſe.

CASE 3.

Ive *againſt* Ambrey.

Outlawry reverſed for diverſity in the name of the attorney. Ante, 340. Dougl. 114.

ERROR upon a judgment in debt, and outlawry thereupon. The error aſſigned was, For that the plaintiff appeared, and declared, and proſecuted *per Ivonem attornatum ſuum*, as the plea-roll was; but the roll of the warranty of attorney is *ponit Jovem ſon attorny*.—And for this cauſe it was held to be error, and ſhould not be amended; but the judgment and outlawry thereupon was reverſed.

CASE 4.

Hall *againſt* Combes.

Trinity Term, 34. *Eliz. Roll* 667.

A grant of all houſes, mills, &c. in *A.* will not paſs a mill in *B.* 2. Co. 33. a. 2. Term Rep. 498. 502.

EJECTIONE FIRMÆ of a leaſe of *Dodington* againſt the defendant, as tenant of one *Ayleſworth*. Upon a ſpecial verdict the caſe was, that king *Henry* the eighth had two mills under one houſe, and granted to *Ayleſworth* all the houſes, mills, lands, &c. in *Wells*, and the ſuburbs and liberties thereof; and it was found that one of thoſe mills was in *Wells*, and the other out of *Wells*, and the liberties and ſuburbs thereof: and, Whether this mill paſſed, foraſmuch as they were both under one roof? was the doubt.—And adjudged for the plaintiff, that it paſſed not.

CASE 5.

Harford *againſt* Gray.

That which comes after the *ſcilicet* in pleading, is but conveyance.

REPLEVIN. The plaintiff in bar to the avowry made title to an hundred, that the abbot of *Abington* was ſeiſed in fee, and pleaded the 31. *Hen.* 8. c. 13. of monaſteries; and that the abbot ſurrendered to king *Henry* the eighth, and that POSTEA, *ſcilicet*, 28. *Hen.* 8. king *Henry* the eighth died ſeiſed, and it deſcended to king *Edward* the ſixth; and from him to queen *Mary*; and from her to queen *Elizabeth*, who now is, who granted it to lord *Norris*, who let to the plaintiff. Upon this bar, a demurrer was joined; and now exception taken, Becauſe it cannot be that the abbot ſhould ſurrender in 33. *Hen.* 8. whereas it is pleaded the king died in 28. *Hen.* 8.—But it was thereto anſwered by TANFIELD, that it was but a miſtaking of the clerk, and might be well amended; for it appears that it cannot be, that king *Henry* the eighth died in the eight-and-twentieth year of his reign, where an act of parliament is pleaded in 31. *Hen.* 8. and a ſurrender in 33. *Hen.* 8. Wherefore that which comes after the POSTEA (*viz.* 28. *Hen.* 8.) is vain and void, and may be well ſtrucken out, and yet the ſenſe remain perfect enough, *viz. quod* POSTEA, he died ſeiſed; and in proof hereof he relied upon 11. *Hen.* 7. *pl.* 3. 20. *Hen.* 6. *pl.* 15. & 11. *Hen.* 6. *pl.* 22.—And of that opinion was all THE COURT, becauſe it is not much material, but matter of conveyance only. *Sed adjournatur.*

Cro. Jac. 96. Mo. 464.

Hore

Hoare *againſt* Broom.

CASE 6.

REPLEVIN. The parties being at iſſue, the jury appeared *in banco* to try it; and the defendant would have challenged the array, *ore tenus*, becauſe it was returned by one *Stonner*, ſheriff, two days after he had received a writ of diſcharge.—And it was held by THE COURT, that he could not challenge it for that cauſe; becauſe it would be a direct averment againſt the record; for it is returned by him as ſheriff; and the return accepted. But by advice of THE COURT, he made his challenge to the array, becauſe it was favourably made and returned in favour of the party, &c. and iſſue being joined thereupon, and all this matter given in evidence, THE COURT directed the *tryors*, that it was not duly made and returned, for it was without warrant. Whereupon the array was quaſhed.

The array cannot be challenged if the cauſe of challenge contradicts the record.

2. Vent. 58. 3. Bac. Abr. 253. 275.

Jordan *againſt* Jordan.

CASE 7.

ASSUMPSIT. And declares, Whereas he ſued a writ of *latitat* againſt the defendant, intending to ſue him for a debt of forty pounds, directed to the ſheriff of *Wilts*, and delivered it to *J. S.* to procure a warrant from the ſheriff to arreſt the defendant; and *J. S.* accordingly obtained a warrant; that the defendant, in conſideration the ſaid *J. S.* would forbear to arreſt him, aſſumed to *J. S.* to appear in the queen's bench, at the day contained in the writ, or to pay the debt; and for non-performance of this promiſe he brought the action. The defendant pleaded *non aſſumpſit*, and found againſt him. And it was now alledged in arreſt of judgment, becauſe he did not ſhew how the debt grew due; nor *in facto* that there was any ſuch debt due. Secondly, Becauſe he declares of a promiſe made to *J. S.* and not to himſelf.—And for this cauſe principally it was held to be ill, and adjudged for the defendant.

The promiſe in an *aſſumpſit* muſt be to the plaintiff himſelf, and not to a third perſon; and the declaration muſt ſhew how the debt grew due.

1. Roll. Ab. 32. Poſt. 849.

Bothwright *againſt* Harvy.

CASE 8.

Michaelmas Term, 36. & 37. *Eliz. Roll* 573.

DEBT upon an obligation of 120l. The condition was, That if he acquitted and ſaved him harmleſs from an obligation of 60l. wherein the plaintiff and defendant were obliged to *J. S.* that then, &c. The defendant pleads, that *J. S.* ſued the plaintiff upon that obligation, and had judgment; but that before execution he delivered the ſixty pounds to the plaintiff to ſatisfy it: and it was thereupon demurred.—Adjudged to be no plea; for although execution be not ſued, yet by the judgment the party is damnified, for his land and body are thereby liable; and although he pays the ſixty pound debt, yet he doth not ſatisfy the coſts. So the bond is not ſaved, for he doth not acquit nor ſave him harmleſs, as 2. & 3. *Eliz.* 186. is. Alſo the bond is conjunctive, "acquit *and* ſave, &c." wherefore he ought to do both, which was not done. And it was thereupon adjudged for the plaintiff.

If a counter bond be given to ſave the obligee harmleſs from another bond in which he is the obligor, the covenant is broken if the original bond be put in ſuit, although the money is afterwards paid. Ante, 264. 350.

1. Ro. Ab. 432. 1. Vent. 261.

Owen, 19. Cro. Car. 350. Yelv. 287. 1. Brownl. 24. 5. Co. 24.

CASE 9.

Philpot's Case.

Upon an *exigent* against husband and wife, if the husband only conform, the Court will not bail till the wife appear. Post. 611. 1. Ro. Ab. 583. Cro. Jac. 445. Stile, 475. 1. Mod. 8. 6. Mod. 17. 105. 10. Mod. 163. Ld. Ray. 73. Salk. 115. Str. 1167. 1237. 1272. 1. Term Rep. 486.

AN exigent was awarded against *Philpot* and his wife, and divers others, upon an indictment of recusancy. The husband appeared upon the exigent, and conformed himself according to law; but the wife made default, and did not appear. The husband prayed to be bailed *de die in diem*, until the appearance of his wife, for the default of the wife ought not to prejudice the husband. And the practice and usage of the common pleas is, where process of outlawry issues against *baron* and *feme*, and the *baron* appears, he shall have day by bail, until the appearance of his *feme*.—But THE COURT said, that it was in the discretion of the Court, when he came in upon the exigent, whether he should be let to bail. And this Court used not to let the *baron* to bail, but to continue him in prison for the contempt of his *feme*, until the *feme* comes in: wherefore the bail was refused. *Vide* 8. *Hen.* 4. *pl.* 6. 21. *Hen.* 6. *pl.* 4.

CASE 10.

Rotheram *against* Crawley.

Easter Term, 35. *Eliz. Roll* 332.

A release of *all duties* will discharge an obligor from the payment of a bond. S. C. Owen, 71. Raym. 399. 8. Co. 153. a.

DEBT upon an obligation. The defendant pleads a release; and upon the pleading, the case appeared to be, that there were controversies betwixt the plaintiff, lord, and the defendant, being his tenant, for a relief and an heriot; and they having submitted it to arbitrament, it was awarded, that there should be a release made of them; and in performance of this arbitrament a release was made by these words: "of all reliefs, duties, and amercements;" and this release pleaded in bar of this obligation, which was not put in arbitrament, nor intended to be released. And upon all this matter disclosed, it was demurred.—COKE, *Attorney General*, moved, that it should not be a bar: for this word "duties" being placed betwixt "reliefs and amercements," shall be intended *duties* of such a nature, and not any other; wherefore it shall not extend to this bond.—But THE COURT held the contrary; for although the intent was not to extinguish it, yet "duty" extends thereto in extremity of law, wherefore it shall be an extinguishment and discharge of the bond. And thereupon it was adjudged for the defendant (*a*).

(*a*) Sed vide 4. Bac. Abr. 289. in notis.

CASE 11.

Thornborough *against* Monpenson.

A covenant "to "make such an "assurance as "counsel shall "devise," expounded. Cro. Jac. 251.

COVENANT. The covenant wherein the breach was assigned was, That he should make such an assurance as his counsel should devise of an annuity of twenty pounds; and alledgeth for breach, that his counsel devised that he should bind himself and his heirs by an obligation for the payment of this annuity yearly, which he had not done. And issue being joined thereupon, after verdict it was moved in arrest of judgment, that this was not within the covenant, and so no breach, for it is not any assurance of the annuity.—POPHAM. If a man covenant to make such an assurance of the manor of *D.* as his counsel shall devise, and the counsel deviseth an obligation or a statute to be made for the peaceable enjoyment thereof, he is not bound to make it (*quod* CURIA *concessit.*) But if the covenant were to do such act or acts for the assurance of the manor of *D.* as his counsel shall devise, and

and they deviſe a ſtatute for the peaceable enjoyment thereof, he is bound to do it.—It was alſo moved, that this was not within the covenant, becauſe the deviſe was, that he ſhould bind him and his heirs; and there is not any word in the covenant, that the heir ſhould be obliged; wherefore, &c.—But THE COURT gave not any anſwer thereto, and it was ended by arbitrament.

THORNBOROUGH *againſt* MONPENSON.

Weaver *againſt* Cardan.

CASE 12.

ACTION for theſe words: "Thou wert detected of perjury in "the ſtar-chamber."—It was held upon motion that the action lay not; for an honeſt man may be detected, but not convicted; ſo no ſlander. *Sed adjournatur.*

Words not actionable. B. R. H. 339.

Harleſton's Caſe.

CASE 13.

IT was found before the coroner, *ſuper viſum corporis*, that *Harleſton* fell into a marlepit *fortuitò*, and ſo died. By the procurement of the queen's almoner, a commiſſion iſſued out of the crown office, in nature of a *melius inquirendum*, and was awarded to the ſheriff to enquire of his death, and of what goods and chattels he was poſſeſſed at the time of his death; and it was found before the ſheriff, that he was *felo de ſe*, &c. It was moved, that this writ or commiſſion was not well awarded, but utterly void; for the 28. *Edw.* 3. c. 9. is expreſs, that no ſuch commiſſion ſhall be granted; and that the ſheriff ſhall not take indictment by writ or commiſſion; and *F. N. B.* 144. & 250. agreeth therewith.—But IVE, the clerk, informed that they have divers precedents ſince that ſtatute of ſuch commiſſion awarded.

1073. 1097. 2. Hawk. P. C. 88. 109.

Melius inquirendum may be awarded, notwithſtanding 28. *Edw.* 3. c. 9. 3. Keb. 800. 1. Mod. 82. 3. Mod. 80. 100. 238. 12. Mod. 112. 496. Carth. 72. 1. Vent. 181. Salk. 190. Strange, 69. 1. Bac. Ab. 496.

Collet *againſt* Marſh.

CASE 14.

Trinity Term, 35. *Eliz. Roll* 38.

ERROR upon a judgment in a *præcipe quòd reddat*. The error aſſigned was, Becauſe the defendant was not ſummoned at the church-door, according to the 31. *Eliz.* c. 3. and by reaſon of his default a *grand capias* was awarded, and judgment given againſt him, and he loſt his land by default, and in truth the ſheriff returned him ſummoned at the church-door. It was thereupon demurred, whether he ſhould have this averment, or ſhould be put only to his action upon the caſe againſt the ſheriff.—*Quære*; for THE COURT upon the motion doubted thereof. *Et adjournatur.* (a)

(a) The judgment was affirmed, poſt. 397.

"*Non ſummonit*" by the ſheriff, in a *præcipe quod reddat* cannot be aſſigned for error. Poſt. 397. Moor, 349. 1. Roll. Abr. 621. 793. Gouldſ. 128.

York *againſt* Allen.

CASE 15.

ATTAINT was brought in the common pleas of a verdict in *banco reginæ*; whereupon the record was removed, and there the verdict was affirmed; and now the plaintiff in the firſt action prays execution according to the firſt verdict, as 7. *Ed.* 6. *Dyer*, 81. is.—And POPHAM and the OTHER JUSTICES held, that he ſhould have execution; for the Juſtices in the common pleas may not award execution, for they have but only *tenorem recordi*. But if the verdict had been diſaffirmed, and execution on the firſt verdict had been had before, the Court of the common pleas might have awarded reſtitution very well, and afterward execution was awarded accordingly.

If verdict in *C. B.* be affirmed on attaint in *B. R.* the Court ſhall award execution on the firſt verdict. 1. Ro. Ab. 887. 3. Bac. Ab. 281. 1. Salk. 321.

Case 16.

Watts *againſt* Hagden.

Pleading.

REPLEVIN. The defendant avows the taking in *White Acre* for *damage feaſant*. The plaintiff replies, that they were taken in *Black Acre*, ABSQUE HOC that they were *damage feaſant* in *White Acre*. It was thereupon demurred.—ET PER CURIAM without argument it was ruled to be an ill traverſe; for he ought to have traverſed the place of the taking, and not that they were *damage feaſant*. Wherefore it was adjudged for the avowant.

Case 17.

Dell *againſt* Higden.

Trinity Term, 36. *Eliz*. *Roll* 54.

Where, by cuſtom, copyholds may be intailed, a recovery may be ſuffered in the lord's court to bar it. Ante, 149. Poſt. 380. 391.

EJECTIONE FIRMÆ. Upon a ſpecial verdict the caſe was, Tenant in tail of a copyhold, remainder in fee, is impleaded by plaint in court baron in nature of a writ of entry in the *poſt*, and ſuffers a common recovery with voucher: Whether this ſhall bind the remainder? was the queſtion; the tenant in tail being dead without iſſue; and it was found, *quòd nunquam antea videbatur talis recuperatio in curiâ manerii prædicti*.—THE COURT upon the motion ſeemed to incline that it ſhould bind the remainder, but they ſpake not much thereto. *Sed adjournatur*.

1. Ro. Ab. 506. Moor, 358. 753. 4. Co. 23. a. Salk. 340. 1. Burr. 210. 1. Wilſ. 26. Gilb. Ten. 176.

Case 18.

Parlet and Bartholmew *againſt* Cray.

Michaelmas Term, 36. & 37. *Eliz*. *Roll* 25.

Fiſh in a pond ſhall go to the heir, and not to the executor. 1. Ro. Ab. 916. Stanf. 25. b. 18 *Edw*. 4. *pl*. 8. Co. Lit. 8. a. 22. Aſſiſe, 25. 18. *Hen*. 8. *pl*. 2. 1. Peere Will. 94.

TRESPASS. The caſe was, That a man having fiſhes in his pond, made his executors, and died. The defendant being his executor takes the fiſhes, and the plaintiff as heir brings treſpaſs: and upon this matter diſcloſed by bar, it was demurred in law.—Adjudged without argument for the plaintiff. For although it be felony to ſteal fiſh out of a dam, or pond, or trunk, as 18. *Edw*. 4. *pl*. 8. yet the owner dying and leaving them in the pond, they are as profits of the freehold, which the executor ſhall not have, but the *heir*, or he who hath the water. Wherefore it was adjudged for the plaintiff.

Case 19.

Leigh *againſt* Shaw.

Trinity Term, 36. *Eliz*. *Roll* 767.

If a man demiſe a *rectory* EXCEPTING *the houſe*, SAVING *a chamber*, to the leſſee, the chamber paſſes by force of the leaſe. 3. Wood's Con. 241.

EJECTIONE FIRMÆ of a chamber. The caſe was, That one let a rectory for years, *excepting* the manſion-houſe of the rectory, *ſaving* to the leſſee the chamber now in queſtion: and, Whether this ſhall be ſaid to be let for years? was the queſtion.—POPHAM. Here is an exception out of an exception, which is good enough, and ſhall make it paſs by force of the leaſe; for this exception or ſaving makes the thing excepted as if it never had been let: ſo a ſaving out of a ſaving makes it as if it never had been excepted, and then it paſſed by force of the leaſe at firſt.—To this opinion without any argument the OTHER JUSTICES agreed. And it was adjudged for the plaintiff.

Stanton

Stanton *againſt* Barnes.

Hilary Term, 39. *Eliz.* *Roll* 492.

CASE 20.

UPON a ſpecial verdict it was found, that it was ancient copyhold land, parcel of the manor of *A.* and deviſable in fee, or for life, *ſolummodo ea capienti extra manus domini.* It was moved, that the ſurrender was to the uſe of one for life, remainder in tail, remainder in fee, who were admitted accordingly by the tenant for life, who dieth; and, Whether that were good to him in the remainder in tail? was the queſtion.—TANFIELD moved, that in regard the cuſtom is ound expreſsly, that it ſhall be *ſolummodo ea capienti extra manus domini*, it ought to be an immediate taking; and he ſhall not take by way of remainder; alſo the cuſtom will not warrant any eſtate but for life or in fee.—But THE COURT reſolved to the contrary, that it is good enough. For in that it is limited to one and the heirs of his body, it is not void; but if it be not an eſtate tail, it is a conditional fee; and ſo it was agreed by us all in the caſe of *Grancener and Rake*; for when a cuſtom warrants a greater, it ſhall warrant the leſſer eſtate alſo. To the ſecond, it may be well limited by way of remainder (as well as to the immediate taker; for when the cuſtom warrants it, it cannot reſtrain a fee to be limited as well by way of remainder) as otherwiſe; and he in remainder and the particular tenant make but one eſtate, and in that it is found that the cuſtom is, that it ſhall be granted *ſolummodo ea capienti*, it is void therein. Wherefore it was adjudged accordingly for the plaintiff.

By cuſtom, a copyhold may be ſurrendered to the uſe of one for life with remainder *in tail.*

Ante, 307. §23
Poſt. 717. 907.

Co. Lit 52. 60
1. Roll Ab. 511
Gilb. Ten. 194.
Carter, 22.
Moor, 173. 188.
1. Leon. 175.
Pop. 128.
1. Sid. 268.
Cro. Car. 45.
3. Lev. 327.
4. Mod. 86.
1. Salk. 189.
2. Atk. 101.
Burr. 2c6.
2. Ld. Ray. 995.

Noke *againſt* Awder.

Trinity Term, 36. *Eliz.* *Roll*

CASE 21.

COVENANT. Wherein he ſhews that one *John King* made a leaſe for years to *A.* the defendant, who by deed granted it to *Abel*, and covenanted with him, that he and his aſſignees ſhould peaceably enjoy it without interruption. *Abel* grants it to *J. S.* who grants the term to the plaintiff, who being ouſted by a ſtranger, brings this action; and after iſſue joined upon a collateral matter, and after verdict for the plaintiff, it was alledged in arreſt of judgment, that this action lay not for the ſecond aſſignee, unleſs he could ſhew the deed of the firſt covenant, and of the aſſignment, and of every mean aſſignment; for without deed none can be aſſignee to take advantage of any covenant, which cannot commence without deed; and to that purpoſe cited *Old Act*, 102. and 19. *Edw.* 2. "*Covenant*," 25. And if one be infeoffed with warranty to him his heirs and aſſignees, and the feoffee makes a feoffment over without deed, the aſſignee ſhall not take advantage of this warranty, becauſe he hath not any deed of aſſignment. But if he had the deed, it ſhould be otherwiſe: and to that purpoſe *vide* 13. *Edw.* 3. "*Vouch.*" 17. 3. *Edw.* 3. "*Monſtrans de Fayts*" 37. 11. *Edw.* 4. *ibid.* 164. 15. *Edw.* 2. *ibid.* 44. 13. *Hen.* 7. 13. & 14. 22. *Aſſ. plea* 88.—But POPHAM held, that he ſhall have advantage without the deed of aſſignment; for there is a difference where a covenant is annexed to a thing, which of its nature cannot paſs at the firſt without deed, and where not. For in the firſt caſe, the aſſignee ought to be in by deed, otherwiſe he ſhall not have advantage of the covenant; and therefore he denied the caſe of the feoffee with warranty; for the ſecond feoffee ſhall have benefit of the warranty, although he doth not ſhew the deed

An aſſignee by *eſtoppel* cannot maintain an action of covenant.

Poſt. 436.

Moor, 419.
3. Co. 63. a.
2. Vent. 61.
2 Ld. Raym. 1532.

NOTE *againſt* AWDER.

of aſſignment, but ſhews the deed of the warranty; and ſo is the better opinion of the books.—And to that opinion the OTHER JUSTICES inclined. *Sed adjournatur.* *Vide* 3. *Co.* 63.

It was adjudged for the defendant, poſt, 437.

CASE 22.

Carrel *againſt* Read.

The entry of a leſſor ſhall not excuſe a leſſee from performing a collateral covenant. Ante, 362.

COVENANT. Leſſee for years covenants to drain ſuch water out of land before ſuch a day. He pleads, that before the day the leſſor entered, and continued in poſſeſſion until after the day: and it was thereupon demurred.—Adjudged to be no plea, becauſe it is a collateral act to be done by him; unleſs he had ſaid, that the leſſor held him out, and diſturbed him to do it.

Moor, 402. Owen, 65. 8. Co. 92. a. 1. Roll. Abr. 453. 1. Bac. Abr. 434. 1. Wood's Con. 431.

Hilary Term.

37. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Thomas Walmſley, *Eſq.*
Francis Beaumond, *Eſq.* } *Juſtices.*
Thomas Owen, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

CASE 1.

Allen *againſt* Hollowell.

The under-tenant of a leſſee of the crown cannot pray in aid of the crown.

EJECTIONE FIRMÆ. The defendant pleads, that the queen was ſeiſed in fee, and let it to *J. S.* for years by patent, who let it to the defendant, and prays in aid of the queen.—And it was ruled to be no plea, becauſe he is not immediate tenant. Wherefore a *reſpondes ouſter* was awarded.

CASE 2.

Day *againſt* Biſbitch.

A dyer's vat faſtened to the *wall* of a houſe, is parcel of the freehold, and cannot be taken in execution under a *fi. fa.*

1. Roll. Ab. 891. 2. Roll. Ab. 556. Co. Lit. 53. Owen, 70.

TRESPASS, for the taking and carrying away a dyer's vat. Upon a ſpecial verdict it was found that the ſheriff, upon an action againſt the plaintiff, attached it, being faſtened to the wall of the houſe, and delivered it to the defendant: and, Whether this taking or delivery were lawful or not? was the queſtion.

FIRST, It was moved, that it could not be attached; becauſe it is parcel of the freehold, and fixed thereto.

SECONDLY, That the action lies not againſt the defendant, becauſe he hath it by the delivery of another, and not by his own taking.

And it was reſolved by all THE COURT, that it could not be attached, in regard it is fixed to the land and wall.—ANDERSON ſaid, that wainſcot fixed to a wall cannot be removed; and if it be,

it

it is waſte. So of tables dormant, fixed, &c.—WALMSLEY ſaid, that in the time of *Lord Dyer*, this difference was here taken, and agreed, that a furnace fixed *in medio domûs* is but a chattel, and is removeable; but otherwiſe it is, being fixed to the walls: and afterwards it was adjudged accordingly for the plaintiff.—The ſecond matter was not much inſiſted upon, becauſe he was preſent and took it, and ſo he was an immediate treſpaſſer. *Vide* 42. *Edw.* 3. *pl.* 6. 20. *Hen.* 7. *pl.* 13. 21. *Hen.* 2. *pl.* 6.

DAY *againſt* BISHITCH.

Brawn *againſt* Michael.

CASE 3.

ACTION for words. Whereas he was a juſtice of the peace, that the defendant ſpake of him theſe words: "He hath de- "livered untruths upon his oath, in his anſwer in the chancery, "at the ſuit of *J. S.*" It was thereupon demurred; and without privity of the Court, in *Mich.* 36. & 37. *Eliz.* judgment was entered for the plaintiff. It was now moved to ſtay the writ of enquiry of damages to be awarded.—And all THE COURT agreed thereto, for judgment was entered without their privity; for they all now agreed, that an action lies not for theſe words. For he might deliver untruths upon his oath in his anſwer, and not be perjured; for there are therein two oaths, the one upon his knowledge, the other upon his evidence, upon report of others, which may be untrue, and he not be perjured. Wherefore, &c.

Words not actionable.

Sharrock *againſt* Hannemer.

CASE 4.

FALSE IMPRISONMENT. The defendant juſtifies, for that he was high-conſtable of the hundred of *D.* in the county of *Salop*, and that the plaintiff made an affray upon *J. S.* and that he came preſently after the affray made, and *J. S.* prayed him that he would take ſuretics of the peace, becauſe he ſtood in fear of his life: whereupon he committed the plaintiff to ward there, (for that he would not find ſureties for the peace), as it was lawful for him to do; and traverſeth the impriſonment in any other county: and it was thereupon demurred.—FIRST, Becauſe a conſtable cannot take ſureties of the peace, unleſs for an affray committed in his view.—SECONDLY, Becauſe the county is not traverſable.—But as to the ſecond, THE COURT would not hear any argument; for there is no queſtion but it is traverſable when the juſtification is local; and ſo it was adjudged in the queen's bench, 27. *Eliz. Roll* 404. *betwixt Dawby and Dawby.*—But as to the firſt, ANDERSON, WALMSLEY, and BEAUMOND held, that the juſtification is not good. For ANDERSON ſaid, that a conſtable may commit one for the breach of the peace in his view, but not if it be done out of his ſight; and he cannot take an obligation for the breach of the peace, if it be not broken in his view; and an high-conſtable is not ſuch an officer, nor conſervator of the peace, whereof the common law takes any notice, for he is not mentioned in any book; and neither the high nor petit conſtable can take any man's oath, that he is in fear of his life: wherefore, &c.—WALMSLEY. A petit-conſtable may commit one who hath broken the peace, although it were out of his ſight, if he will not find ſureties of the peace, upon information that one intends to make

A conſtable cannot arreſt for an affray *out of his view* without warrant, except *felony* is likely to enſue. Ante, 168. 204. Lamb. 132. Bro. Surety, 23. 36. Moor, 284. Savil, 97. Owen. 105. 1. Hawk. 269. 2. Hawk. 97. 1. Bac. Abr. 441. 2. Ld. Raym. 1195. Dougl. 359. 671.

SHARROCK *against* HANNEMER.

a battery, and to disturb the peace; for by preventing of the occasion of the breach of the peace, it shall be well preserved. And although that 10. *Edw.* 4. 22. *Edw.* 4. *pl.* 25. 3. *Hen.* 4. *pl.* 9. are, that he may commit one upon view of the breach of the peace, and make him find surety therefore; yet 44. *Edw.* 3. *title* "*Barr.*" is, that he may do it upon information of the peace broken, or to be broken, or that he comes where the persons are assembled to break it; for thereby the breach shall be avoided: but he may not take sureties by recognizance entered, because he is not a judge, nor any officer of record, but is elected by matter *in pais*, and therefore may take surety by matter *in fait*, *viz.* the obligation. But an high-constable cannot do so; for he is not a conservator of the peace by any law, nor find I any authority which mentions him; and in the north there are not any high-constables. But neither high nor petit constable can take an oath of any one, that he is in fear of his life: wherefore, &c.—BEAUMOND. A constable and sheriff are conservators of the peace at the common law, and may take surety of the peace by obligation, upon view of the peace broken or tumult made; otherwise not. But they cannot take any man's oath that he is afraid of death; for he is not a judge, nor officer of record; which is the reason that an obligation taken by him shall be in his own name, and not in the queen's name; and shall be certified at the sessions of peace. But a chief-constable cannot do so; nor are they by the common law, but by custom, and for conformity: wherefore, &c. —OWEN. A constable is a conservator of the peace by the common law, and may take sureties of the peace, as well before the peace broken as after, for otherwise it would be too late; and this authority at the common law yet remains, and that a chief-constable may also do it.—But notwithstanding his opinion, for the reasons before expressed, it was adjudged for the plaintiff.

CASE 5.

Mercer *against* Charter.

Easter Term, 33. *Eliz.* *Roll* 1618.

Qu. In what manner an imperfect special verdict *in attaint* shall be remedied.

Ante, 309. Post. 645, 646. F. N. B. 108. D. Co. Lit. 139. a. 3. Ll. Com. 402.

ATTAINT upon a verdict in an assise.—A special verdict was found which was imperfect in divers points, and how it should be remedied was much doubted; for they all resolved he could not have a certificate, although a certificate lies in the first action. A new *venire facias* also lies not; because no *venire facias* lies in the action, but it was a jury the first day. But as they were now advised, they conceived that he should have a new summons of the jurors in the action. ANDERSON and BEAUMOND held, that he might discontinue this action, and bring a new attaint. But WALMSLEY and OWEN conceived, that after a discontinuance by act of the party, he shall not have a new attaint; neither by the common law, nor at this day by the 23. *Hen.* 8. c. 3. but that he shall be fined and ransomed. But they all resolved, that after a nonsuit, he shall not have a new attaint, neither by the common law nor by the said statute. *Et adjournatur.*

Bald*win*

Baldwin *againſt* Wiſeman.

CASE 6.

Trinity Term, 36. Eliz. Roll 906.

TRESPASS. Upon a ſpecial verdict it was found, that *Richard Baldwin* had iſſue *Richard* and *Henry*, and two daughters; and deviſed his land to *Henry* in tail, if he lived unto his age of twenty-four years, upon condition that he ſhould pay 100l. to his daughters; and if *Henry* died without heir, then if *Richard* did not pay the ſaid 100l. that it ſhould remain to his daughters and their heirs. Whether this were a condition, or a remainder by limitation to the daughters? was the queſtion.—WALMSLEY and BEAUMOND held, that it was a condition: and BEAUMOND ſaid, that a deviſe to *J. S.* paying 100l. to *J. D.* and if he fail, that it ſhall remain to *J. D.* is a void remainder; ſo a deviſe to *A.* and his heirs, and if he die without heir, that it ſhall remain to *B.* is a void remainder. But OWEN *è contra* in the principal caſe; for it is a limitation by reaſon of the intent.—But being afterwards moved again, it was adjudged according to the opinion of WALMSLEY *ut ſupra*, that it is not any limitation, but a condition; and that *Richard* was in for the condition broken (*a*).

A deviſe to *A.* in tail, "upon "condition that "he pay 100l. "to *B.*; and "if *A.* dies "without heir, "then if *C.* do "not pay the "100l. the land "ſhould remain "to *B.*" This is a *condition*, and not a *limitation*. Ante, 205. 1. Roll. Ab. 411. Goldſ. 152. Cowp. 841. Dougl. 63. 75. 683.

(*a*) This judgment was reverſed upon a writ of error in the queen's bench, Eaſt. 37. Eliz. and it was agreed by GAWDY, CLENCH, and FENNER, to be a *limitation*, and not a *condition*. Owen, 112. See alſo Dyer, 128. Plowd. 408.

Elizabeth Counteſs of Rutland *againſt* Iſabel Counteſs of Rutland.

CASE 7.

ELIZABETH *counteſs of Rutland*, and other executors of EDWARD *earl of Rutland*, executor of *John earl of Rutland*, againſt ISABEL *counteſs of Rutland*. Action upon the caſe of *trover* of divers jewels and other goods to the value of 1000l. and alledgeth, that the defendant knowing thoſe goods to appertain to JOHN *earl of Rutland* in his life-time, and after his death to EDWARD *earl of Rutland*, as executor to JOHN, and after his death to the plaintiff, as executor to EDWARD, executor to *John*, had converted them to their damage of 1000l. The defendant pleaded not guilty; and found guilty to the damage of 940 l.

Trover lies by an executor upon a converſion in the time of the teſtator, although the goods have never been in the *actual* poſſeſſion of the executor; and the time of the converſion is not traverſable, and need not be alledged in the declaration. Poſt. 384. 387. 1. Roll Ab. 288. Owen, 156. Moor, 256. 2. Roll. Ab. 554. Lut. 167. 214. 2. Mod. 168. Sav. 118. 133. Pop. 189. 1. Leon. 193. Hob. 10. Vent. 30.

It was now moved in arreſt of judgment, that this action lies not for an executor upon a *trover* and converſion in the time of their teſtator; for it is not within the 4. *Edw.* 3. c. 7. as a *quare impedit* and an *ejectione firmæ* have been taken to be within the equity thereof.

Secondly, Becauſe there is not any certain time ſhewn of the converſion, whether it were in the time of the teſtator or of the executor.

YELVERTON to the *firſt* exception. The action well lies for an executor by the equity of the ſtatute. And ſo it was adjudged *Paſch.* 33. *Eliz. B. R.* that this action lies for executors upon a *trover* and converſion in the time of their teſtator; and it was one *Drake's Caſe*.—To the *ſecond*, the day of the converſion is not material; for be it in the time of the one or the other, the executor ſhall recover and have damages to the uſe of their teſtator. But the count is certain enough; for it is, "that the defendant know-"ing the goods to be the goods of the ſaid *John earl of Rutland*, "and intending to defraud the plaintiffs, had converted them;"

ſo

RUTLAND *againſt* RUTLAND.

ſo of neceſſity it is to be intended, that the converſion was in the plaintiff's time.

As to the firſt, all THE JUSTICES reſolved, that an executor may well maintain an action for goods converted in the time of their teſtator, by the equity of the 4. *Edw.* 3. c. 7. as well as a *quare impedit*; and ſo is the common experience at this day.

But as to the ſecond, BEAUMOND and OWEN held it to be a material exception; for the day of the converſion ought to be expreſly laid, although it is not traverſable: for it is matter of ſubſtance, and the point of the action; and therefore the day and place of the converſion ought to be expreſly mentioned. And it hath been adjudged in the queen's bench in *Stranſham's Caſe*, and in *Sir Thomas Pylliſton's Caſe*, that the place of the converſion ought to be laid; otherwiſe it is ill: and as this caſe is, the action may be brought of the converſion in the time of the teſtator, or in his own time: and it is doubtful in whoſe right it is brought, for want of the time certainly expreſſed: and in the one caſe he ought to have his action upon the ſtatute; and in the other caſe, by the common law: wherefore it is not good.

Ante, 97.

But ANDERSON and WALMSLEY held ſtrongly to the contrary: for the caſe being agreed, that the executors ſhall have the action as well for the converſion in the time of their teſtator as in their own time, it is not material in whoſe right the action is brought; for they are to recover damages to the uſe of their teſtator both ways. And it is agreed on all ſides, that the day laid down is not traverſable: and not being expreſſed, it is not much material; nor the inqueſt ſhall not have regard thereto: but the time is well laid down; for it is *poſt mortem*, intending to defraud: ſo of neceſſity it is to be intended, that the converſion was *poſt mortem*. And as to the caſes cited, that the place of the converſion is material in this action, that is, becauſe otherwiſe there cannot be any trial, if no place had been alledged; but as this caſe is, being after verdict, it is not any exception to ſtay the judgment; although peradventure it might have been an exception, if there had been a demurrer thereupon; for that is not in default of ſubſtance, but it is to the manner only.—Afterwards, in this Term, the record of the caſe of *Ruſſel and Pratt*, which was *Hilary*, 21. *Eliz. Roll* 410. *in banco reginæ*, was brought in and ſhewn; and in that it was proved, that an action lies for an executor for a converſion in the time of his teſtator; but nothing proved for the day. And it was ſaid by ANDERSON, that the *Lord Chief Juſtice* and *Chief Baron* were of this opinion. But further day was given till the next Term; and if any of the parties died, judgment ſhould be *tunc pro nunc*.—And afterward, the next Term, it was adjudged accordingly for the plaintiff.

1. Rol. 485.

Several executors may ſue by attorney, tho' ſome of them are within age.

NOTA. That in this caſe it was reſolved, that three *executors* bringing this action, and the one being an infant, and they all ſued by attorney, that it was good; becauſe they all are but one perſon, and ſue *in autre droit*, and not in their own right; and it is not reaſonable that one or two ſhould ſue by attorney, and a third by guardian or *prochein amy*.

1. Roll. Ab. 288. 1. Sid. 449. 2. Mod. 248.

Sed vide 2. Saund. 213. 1. Vent. 102. 1. Mod. 296. 1. Lev. 299. *contra*.

Walker

Walker *againſt* Collier.

CASE 8.

Hilary Term, 36. *Eliz. Roll* 906. *or* 306.

A deviſe to one for life, remainder to another, *paying* a certain ſum to a third perſon; the remainder-man ſhall take a fee *conditional*. Ante, 106. 205. Poſt. 498. 745. 5. Co. 21. 6. Co. 16. a. 106. 564. 687.

TRESPASS. Upon a ſpecial verdict the caſe was, The land was deviſed to one for life, remainder to the plaintiff, *paying* five and forty ſhillings to *John S.* and it was found, that the land was worth three pounds *per annum*. The tenant for life died; and, Whether the plaintiff had thereby a fee, or for life? was the queſtion.—And all THE COURT reſolved, without any great argument, that he ſhould have it in fee, eſpecially when the money is not appointed to be annually paid. And ANDERSON ſaid, that this word "*paying*" made his eſtate conditional: but the not finding whether it was paid is not material; no more is the finding of the value. Wherefore it was adjudged *ut ſupra* for the plaintiff.

Cro. Car. 158. 416. Cro. Jac. 527. 2. Mod. 25. Salk. 685. Cowp. 835. 2. Vern. Gilb. Dev. 21, 32. Cowp. 841.

Chomley *againſt* Humble.

CASE 9.

Hilary Term, 35. *Eliz. Roll* 2018.

A feoffment to one for life, with remainders over in tail, PROVISO that if any of them in remainder in tail ſhall alien, the uſes ſhall ceaſe in reſpect to him, as if he were dead. This *proviſo* is repugnant, impoſſible, and againſt law, 1. Co. 84. 1. And. 346. 2. And. 134. Hob. 170. Cro. Jac. 696. 698. 2. And. 142. 149. 6. Co. 43. a. 10. Co. 42. b. Winch 56. 1. And. 346. Moor, 592. 805. 633. 1. Bac. Abr. 411, 412. 4. Bac. Abr. 324. Dougl. 755.

TRESPASS. Upon demurrer the caſe was, A feoffment was made to the uſe of one for life, remainder to *Henry Chomley* in tail, remainder to another in tail, remainder over in fee to the lord chamberlain, *Lord Hunſdon*, with this *proviſo*, "That if any of "them in remainder in tail *go about to levy a fine*, or to do any act, "whereby the uſes limited ſhall not take effect according to the "limitation, or that there ſhall be any diſcontinuance; that then "the eſtate of him who ſo goeth about ſhall ceaſe, as if he were na-"turally dead, and no otherwiſe." And, Whether this were a good *proviſo*, and that the eſtate ſhall ceaſe by ſuch an act done? was the queſtion.

After argument by the *Serjeants* on either ſide, THE COURT delivered their opinion, that it was not good.

ANDERSON. At the common law *ceſtuy que uſe* had nothing; and an eſtate of inheritance at the common law cannot ceaſe; and the ſtatute of uſes doth not help it: for the ſtatute cannot help any uſe, where there is not any perſon who is ſeiſed to the uſe.

WALMSLEY. The *proviſo*, that it ſhall ceaſe, as if he were naturally dead, is void, and without ſenſe; for if he were dead, it ſhould deſcend to the ſon, and he ſhould be in, in the *per*, by the father, and it ſhould come unto him *quaſi* by degrees and ſteps; but that cannot be when the father is *in eſſe* and living: wherefore the words in the *proviſo* to this purpoſe are void, and without any ſignification, and they are as if they never had been mentioned; and ſo it is an eſtate tail abſolute and without condition: but in entry into religion, the land ſhall deſcend to the ſon; for the law reputes him dead. But if an act of parliament had been made *ut ſupra*, it ſhould be good enough, and ſhould make a diſcent to the ſon without death; but by conveyance there cannot any ſuch diſcent be made (*a*): and an eſtate of inheritance in land cannot be made to ceaſe by any conveyance, without ſome other act doing.—BEAUMOND *ad idem*. An eſtate in tail cannot ceaſe at the common law, no more can it in uſe at this day; for it is as an eſtate executed at the common law; and the iſſue cannot have a *formedon*, living the father; and that feoffees at this day ſhould be ſeiſed to his uſe is abſurd. Wherefore, &c. *Sea adjournatur*.

(*a*) Ante, 361. 6. Co. 40. b. Raym. 355. 13. Co. 64. Dy. 351. b.

CROMLEY *against* HUMBLE

adjournatur, and not adjudged at that time.—But afterwards in the next Term adjudged, that the *proviſo* was not good (*b*), and that the iſſue could not have it for the forfeiture. 1. *Co.* 86.

(*b*) Moor, 592. 1. Co. 138. b. Co. Lit. 27. a. 6. Co. 41. b. 8. Co. 17. a.

CASE 10.

In account againſt a receiver, the place where he received is not local, but tranſitory, and therefore not traverſable. Ante, 168. 184. Poſt. 667. 705. 842. 3. Com. Dig. 117.

Dyotto *againſt* Curredale.

ACCOMPT. Suppoſing that he was his receiver at *London* to render accompt. The defendant ſaith, that he received it at *Litchfield* to deliver over to *J. S.* which he had delivered, ABSQUE HOC that he was his receiver at *London*.—And it was thereupon demurred; and without argument adjudged for the plaintiff: for the place of the receipt is not traverſable; for the receipt is not local but tranſitory, which matter may be given in evidence in any place. But if the traverſe had been, ABSQUE HOC that he received it in another manner, it had been well enough. Wherefore it was adjudged *ut ſupra*.

CASE 11.

An *aſſumpſit* will not lie upon a promiſe to pay over money received from a third perſon, unleſs a day of payment be given. *Quære.*

Howlet *againſt* Oſbourn.

ASSUMPSIT. The caſe was, That one delivered ten pounds to the defendant to deliver to the plaintiff; and the defendant promiſed the plaintiff to pay it unto him. Upon this the plaintiff brought his action.—And ruled, that it lies not. But WALMSLEY ſaid, if the plaintiff had given a day before the payment thereof, it had been a good conſideration.

Cowp. 290. Dougl. 23.

CASE 12.

A recovery in the lord's court againſt a tenant in tail copyholder is a diſcontinuance; and *quære* if it is not a bar. Ante, 372. Poſt. 391.

Eylet *againſt* Lane and Pers.

TRESPASS. It was found by ſpecial verdict, that the land was demiſable in fee, or in tail by the cuſtom; and that this land was demiſed in tail by copy, and that the copyholder ſuffered a recovery in a writ of entry in the *poſt*, with voucher over; and that ſuch recoveries were not uſed there before: and, Whether this ſhould bind the eſtate tail or no? was the queſtion.—And THE COURT upon motion thereof conceived, that it ſhould be hard to warrant ſuch recoveries, unleſs there be a ſpecial cuſtom to maintain it; and it is hard to maintain it; for a warranty cannot be annexed to ſuch an eſtate. *Quære.*—But afterwards it was adjudged, that this recovery being againſt the tenant in tail himſelf, was at the leaſt a diſcontinuance, as it is of a recovery againſt tenant in tail in poſſeſſion at the common law: but, Whether it were a bar to the intail or not? they agreed not in opinion. But for the cauſe of the diſcontinuance, judgment was given for the defendant.

1. Roll. Ab. 506. 2. Com. Dig. 528. Gilb. Ten. 176. 189. 1. Bac. Ab. 460. 1. Wilſ. 26.

CASE 13.

If the grantee of an annuity die before the money becomes due, the payment is diſcharged.

Price *againſt* Williams.

DEBT as executor to *Lady Price* upon an obligation. The condition was for the payment annually of forty pounds during the life of the lady at the feaſt of *Saint Michael* and the *Annunciation*, or within thirty days after every of the ſaid feaſts. The lady dies within the thirty days: Whether this ſhall diſcharge the payment due at the ſaid feaſt before her death?—And THE COURT held that it did (*a*).

10. Co. 32. 79. b. 1. Lev. 54. Dougl. 519. Cowp. 540. 2. Term Rep. 366. 1. Peer. Will. 179.

(*a*) Vide 11. Geo. 2. c. 19. ſ. 25. as to the recovery of rents from under-tenants where tenants for life die before the rent is payable.

Percy

Percy *againſt* Bardolf.

CASE 2.

Hilary Term, 37. Eliz.—In the Exchequer Chamber.

ERROR upon a judgment given in the queen's bench. Debt was brought againſt *baron* and *feme*, for the debt of the *feme*, upon an obligation made by the *feme dum ſola fuit*. Upon *non eſt factum* pleaded, and found for the plaintiff, judgment was, that the *baron* ſhall be *in miſericordiâ*, and that the *feme capiatur*.—And this being aſſigned for error, the judgment was reverſed; for it ſhould be *capiantur* for both. 34. *Hen.* 6. *pl.* 23. 15. *Edw.* 4. *pl.* 2. 3. *Edw.* 4. *pl.* 24. 4. *Edw.* 4. *pl.* 25. 1. *Hen.* 7. *pl.* 25. 9. *Hen.* 6. *pl.* 9. 9. Co. 72.—Sed vide Cro. Car. 513. Hob. 98. 101. *contra*. See Stra. 1167. 1237. 1. Term Rep. 486.

A *capiatur* ſhall be entered againſt the huſband for the debt of his wife.

Moor, 704. Cro. Jac. 203. 440. 1. Ro. Ab. 221. Cro. Car. 407. Wilſon, 149.

Eaſter

37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

CASE 1.

Evidence that a perſon *occupied* an office by reputation, is proof that he *had* the office. Moor, 401. Comp. 66. 502. 1. Term Rep. 161.

Dudley *againſt* Kington.

DEBT upon an obligation. The condition was, that if the plaintiff had poſſeſſed and enjoyed the office of beadleſhip of the court of conſcience in *London*, that then, &c. The defendant pleaded, *quòd habuit, gaviſus fuit et occupavit, &c.* whereupon they were at iſſue. And the jury found, that the plaintiff did exerciſe and occupy that office from the time of the bond made until that time; but whether it were an office *de jure* they knew not. *Et ſi ſuper totam materiam videtur Curiæ*, that THAT ſhould be ſaid to be an having, poſſeſſing and enjoying of the office, they found for the defendant; otherwiſe for the plaintiff.—And HARRIS *ſerjeant* hereupon moved, that this verdict is for the plaintiff; for this occupying of the office cannot be ſaid to be an *having* and *enjoying* thereof; for a deputy may exerciſe an office, yet he hath not any office; as 39. *Hen.* 6. is.—And to that opinion GAWDY inclined; for it ought to be an *having in intereſt*, and not only an occupation which ſhall make a performance of the condition.—But POPHAM, FENNER, and CLENCH, *è contra.* For FENNER ſaid, there was a diverſity betwixt an office in verity, and an office in reputation only: for an office in reputation which is not *revera*, one cannot have any other poſſeſſion than by the occupation thereof; and the occupying thereof is all the enjoying which may be of it; for it is not an office in intereſt, but only in the name and uſe thereof; and therefore there cannot be any intereſt thereof but by the uſing it; as to have the office of marſhal or tryor before the Juſtices of aſſiſe, or the like. Wherefore, &c.—And afterwards judgment was given accordingly for the defendant.

CASE 2.

A *uſe* cannot be limited upon a *uſe*. See Note (1), Co. Lit. 271. b.

Girland *againſt* Sharp.

TRESPASS. Upon demurrer the caſe was, That one infeoffed his two ſons to the uſe of himſelf for life, and after to the uſe of them and their heirs, *ad ultimam voluntatem ſuam perimplendam*; and afterwards deviſed it to *Sharp*, the defendant, in fee: and, Whether *Sharp* hereby ſhall have the land, or not? was the queſtion. —GAWDY conceived, that he ſhould not; for an uſe cannot be limited upon an uſe; then when he limits it to the uſe of his two ſons and their heirs, he cannot afterwards limit it to the uſes of his laſt will. But the words, *ad performandum ultimam voluntatem*, as

to

to limit any uſes thereby, are void words. And to that opinion CLENCH agreed: but FENNER doubted thereof. Wherefore it was adjourned.

GIRLAND *againſt* SHARP.

Thinn *againſt* Chomley.

CASE 3.

Trinity Term, 36. Eliz. Roll 842.

If a tenant who is chargeable with the rent aſſign over his intereſt in the land, the aſſignee is chargeable with the penalty for arrears incurred in his own time.

DEBT. And declares, that he let certain land to *Agar* for one-and-twenty years, rendering annually at the *Temple Church*, *London*, thirty pounds at *Michaelmas* and the *Annunciation*. *Et ſi contingat* that the ſaid rent ſhould be behind, and not paid at the days, &c. that then the ſaid *Agar*, his executors and aſſigns, ſhould forfeit *nomine pœnæ* three ſhillings and four-pence for every day which ſhould incur after ſuch default, until the ſaid rent and arrearages ſhould be paid. That afterward, upon 28. *February*, 32. *Eliz.* the ſaid *Agar* granted his eſtate to the defendant; and that after the grant at *Michaelmas*, *anno* 33. *Eliz.* the rent was arrear, and not paid; and it was in arrear for five hundred ſeventy-ſix days after. And that at another rent day it was in arrear, and not paid, and remained in arrear for twelve days. Wherefore he had forfeited, &c. Whereupon he demanded three hundred pounds ſixteen ſhillings and eight pence. The defendant thereupon pleaded *nil debet*; and it was found againſt him.

Gould. 129. 186. Moor, 357. Hob. 82. Dougl. 643. 636. 764.

It was now moved in arreſt of judgment, that this action lies not againſt the aſſignee; for this penalty is merely founded upon the contract, which is in privity betwixt the leſſor and the leſſee; and it runs not with the land.

But GAWDY and CLENCH held that it well lay; for the land is charged therewith; and the aſſignee for his own time ſhall be chargeable. But FENNER held *è contra*; for the penalty is *quaſi* collateral.

FENNER alſo moved, that the declaration was not good; for he is not entitled to the penalty, unleſs the rent be demanded, no more than he ſhould be to the forfeiture of a leaſe for non-payment.

GAWDY. It is not alike; for the condition which goes in defeaſance of an eſtate ſhall be taken ſtrictly; but the penalty is in nature of the rent: and as he ſhall have the rent itſelf without demand, ſo he ſhall have the penalty. And to that opinion CLENCH agreed, POPHAM *abſente*. Wherefore it was adjourned.

Co. 70. 28. b.

Goodale *againſt* Wyet.

CASE 4.

Hilary Term, 37. Eliz. Roll 805.

A condition to pay the heirs, &c. of the feoffee, is performed by a *bona fide* payment to the heir, although the feoffee has made a feoffment over; but a covinous payment ſhall not defeat the eſtate of the ſecond feoffee. Ante, 67.

EJECTIONE FIRMÆ for lands in *Ayleſbury*. Upon a ſpecial verdict the caſe was, That *Sir John Packington*, by deed indented, infeoffed of thoſe lands one *Woodliff*, upon condition, that if *he* paid to the heirs, executors, or adminiſtrators of *Woodliff* one hundred marks within a year after his death, that then *charta prædicta et ſeiſina ſuperinde deliberata foret vacua et nullius effectûs*. *Woodliff* infeoffs *J. S.* thereof, and dies; and within a year after his death *Sir John Packington* agrees with the heir of *Woodliff* for thirty and two pounds to be paid in ſatisfaction of the hundred marks. Nevertheleſs at the day he paid unto him the one hundred marks, upon his promiſe beforehand to re-deliver all unto him but the two and thirty pounds; and the heir then returned back unto him all but the two and thirty pounds. And hereupon *Sir John Packington* entered upon *J. S.* who entered and let it to the plaintiff.

POP-

GOODALE *againſt* WYET.

Co. Lit. 95. 209. Moor, 708. 5. Co. 95. 1. Ro. Ab. 408. Gouldſ. 177. Poph. 99. Godb. 299. 1. Wood's Con. 273. 283. 290. 299. 362. Shep. Touch. 140.

POPHAM. Although the one hundred marks were entirely paid, and ſo the condition was performed in words, yet circumſtance will make it to be no payment nor performance in law; for payments ought to be plain and true: but here there is not any true payment of more than thirty and two pounds; for of the reſidue there was not any payment; for he that paid it may thereof have an account againſt him who received it: and it is as no payment, but *quaſi* a receipt to render an accompt. And to that opinion GAWDY ſeemed to agree.

GAWDY alſo held, that the money ought to have been paid here to the aſſignee; for he is the party who is to have the loſs; and therefore he ought to have the payment. And although he be not named it is not material: and for that purpoſe *vide* 6. *Rich.* 2. "*Quid* "*Juris clamat.*"—Wherefore they adviſed the jury to find this matter ſpecially; and ſo they did. *Quære tamen de eo, Perkins*, 148. And after argument it was adjudged accordingly for the plaintiff, for the reaſon before ſpecified.—NOTE, That afterwards a writ of error was brought upon this judgment, and the error was aſſigned in point of law: and affirmed that they were good words of a condition; and that this payment being covinous, was no performance. 5. *Co.* 95. b.

CASE 5.

To treſpaſs for chaſing cattle *ita quod* it died, a juſtification of the *chaſing* without anſwering the death is bad. Ante, 30. 94.

See 1. Lev. 283. Salk. 459. where this is denied to be law.

Hill *againſt* Prideaux.

TRESPASS. For that he chaſed his cattle *in tantum ita quòd per fugationem interierunt.* The defendant pleads, that the place where, &c. is holden of him by ſuch ſervices; and he diſtrained thoſe beaſts, and impounded them in a *pound overt*; and that they died there *de fame* in default of the plaintiff, the which is the ſame treſpaſs: and it was thereupon demurred.—And without argument adjudged for the plaintiff; for when the plaintiff alledged, that *in tantum effugavit quòd per effugationem interierunt*, and he pleads, *quòd fame interierunt*, that is not any plea without a traverſe, *quòd per effugationem non interierunt.*

CASE 6.

Words. Moor, 401. Ante, 62. Poſt. 470.

Jenkinſon *againſt* Mayne.

ACTION for theſe words: "The plaintiff deſerved to have "his ears nailed to the pillory."—Adjudged that the action lies.

CASE 7.

An adminiſtrator may maintain an action for *treſpaſs* in the life-time of the inteſtate. Ante, 377.

Smith *againſt* Vanger Colgay.

TRESPASS by an adminiſtrator *de bonis aſportatis in vitâ inteſtati.* After verdict it was moved in arreſt of judgment, that this action is not given by the 4. *Edw.* 3. c. 7.—But ruled without argument, that the action lay by the equity of the ſtatute; for it is in equal miſchief. 14. *Hen.* 7. *pl.* 13. "*Accord.*"

CASE 8.

Earl of Pembroke *againſt* Sir Henry Berkley.

Eaſter Term, 36. *Eliz. Roll* 351.

A grant of a walk in a foreſt, "PROVIDED, "and the ſaid *A. B. (the grantee)* doth covenant not to fell or cut any wood but for neceſſary browze"—the heir of the grantee cuts down four oaks—this is no forfeiture; for the PROVISO is a *condition* and not a *covenant.* Poſt. 560. Moor, 706. 2. And. 20. 2. Co. 71. b. Poph. 116. Gould. 130.

ACTION upon the caſe, for diſturbing him to execute his office. Upon demurrer the caſe was, That the *Earl of Pembroke* was ſeiſed in fee of the manor of *Froomſwood*, in the county

Of

of *Somerset*, with the custody of the forest of *Fromeswood* thereto appertaining (the forest being the queen's), he granted by indenture to *Sir Maurice Berkley*, father to the defendant, and to the heirs males of his body, the office of the lieutenantship of the forest, and the custody of a walk within the said forest called *Stavordale Walk*, with all fees thereto appertaining: "PROVIDED, and "the said *Maurice Berkley* doth covenant, promise, and grant for "him, his heirs, &c. that the said earl, &c. shall have the com- "mand of the game there. PROVIDED also, and the said *Mau- "rice Berkley* doth further covenant, not to fell or cut any wood, "but for necessary browse." *Sir Maurice Berkley* dies, and afterwards *Sir Henry Berkley* being his heir, enters and cuts down four oaks, whereupon the earl claimed it for the condition broken: and, Whether it were a condition or but a covenant, and whether it were broken, and if the estate of *Sir Henry Berkley* by this act done, be determined and forfeited? were the questions.

PEMBROKE *against* BERKLEY.

5. Co. 76. 9. Co. 50. 1. And. 29. Pop. 117. Moor, 707. 2. Mod. 121.

TANFIELD and ATKINSON argued that it was but a covenant, and not a condition; for the words are all the words of the lessee, and there is not any restraint imposed by the lessor; and being conjoined by the lessee with the covenant, are only of the nature of a covenant, and not conditional. But if it had been, "PRO- "VIDED always, and it is covenanted, &c." there peradventure it might have been a condition; for they are the words as well of the lessor as of the lessee; and in proof thereof relied upon 28. *Hen.* 8. *pl.* 6. & 13. 3. & 4. *Phil. & Mar.* 150. *Gravenor's Case*, 5. *Eliz.* 222. & 318. That the word PROVISO being coupled with a covenant, and being spoken by the lessee only, do not amount to a condition, but to a covenant only. But *Pasch.* 33. *Eliz. Rot.* 709. in the common pleas, betwixt *Symson* and *Totterell*, where a PROVISO was, "And it is covenanted and granted that the lessee "shall not assign his term," it was adjudged to be a condition, for the reasons before; and here are not any words which shew the intent of the parties to make the estate conditional; but rather *è contra*. For the first clearly is not any condition, but a covenant only. And of the same nature is the second, for that is, "pro- "vided also, &c." which is in the same manner; and although the words in the indenture are *quasi* the words of both, yet they are properly the words of him who speaks them.

Ante, 202.

Ante, 242.

COKE, *the Queen's Attorney*, and WILLIAMS, *serjeant*, *è contra*. For this PROVISO sounds as a condition, because it stands *substantive*; and it is to restrain the doing of a thing; and it is also a covenant of the breach whereof damages shall be recovered. But admit it were not a condition, yet the cutting down of the trees was a forfeiture of his office, by a condition in law annexed thereto, whereof the earl shall take advantage, and not the queen, as 39. *Hen.* 6. is.

GAWDY. This *proviso* here is not any condition; for a *proviso* of itself in a deed which hath not any perfect sentence annexed thereto, is neither a condition nor a covenant. For the conclusion thereof shews how it should be taken, but this is matched here with the words of a covenant; so that the words which make it to have any perfect sense rest only in covenant; for, if it should be taken by itself, it hath not any meaning, and then it cannot make it a condi-

PEMBROKE *against* BERKLEY.

tion: the words also spoken by the lessee only, shall never make a condition. And to that opinion CLENCH agreed.

Ante, 202. Post. 486.

POPHAM and FENNER *è contra*; for the *proviso* here hath a perfect conclusion. For the words that the lessee shall not fell trees, refer to the *proviso* and to the covenant; so it founds as well to the condition as to the covenant; and it shall be as if there had been several sentences; and there is not any difference betwixt this

Co. Lit. 233. b.

and the case of *Symson v. Totterell* before recited. POPHAM said, that if there were not here a condition *in fait*, the defendant had forfeited his estate by a condition in law annexed thereto; and that forfeiture is to the plaintiff. For it is a condition annexed, that he shall preserve the game; and when he destroys that which is for the preservation of them, he thereby breaks the condition in law; and although the *woodward* may by his office cut down trees and not be punished, yet the laws shall punish a *keeper* who offends therein. And as to that which hath been said, that if it be a forfeiture, it shall be to the queen of the entire office, that is not so; for there is a difference when a man hath an office, and grants the entire office to another for life, and the grantee breaks a condition in law, the entire office is forfeited. But if a man hath another inferior office derived out of his office, but not any part of the principal office, but appertaining thereto, and in his gift, the forfeiture of the inferior office is given to the grantor, and it shall not be a forfeiture of both offices; which is the reason of the case 39. *Hen.* 6. of the case of the duke of *Norfolk*.

GAWDY. I do not remember any book, that the cutting down of trees is the forfeiture of the office of a parker; for the condition annexed to his office is but to preserve the deer; and therefore 5. *Edw.* 4. if a stranger kills the deer, it is a forfeiture of his office. But clearly it is not so if the stranger cut down the trees: and as this case is, it doth not appear to be any forfeiture; for although the defendant hath cut down four trees, yet it appears not but that there is sufficient left for browse and shade for the deer, and for covert for them. Wherefore, &c. *Adjournatur.*—Afterwards, upon conference amongst all THE JUSTICES of *England*, it was held by the greater part of them to be a condition, and adjudged accordingly (*a*).

(*a* Vide post. 560, where a writ of error was brought, and the Judges would not suffer it to be again argued that it was not a condition.—See also 2. Co. 71.

CASE 9.

Portman *against* Willis.

Leases for years will not pass by A GRANT of *omnia bona*, but they will pass by such words in A WILL.

EJECTIONE FIRMÆ. Upon a special verdict it was found, that the bishop of *Winchester*, 26. *Hen.* 8. let the land to *Robert Hill* for 99 years. That *Robert Hill* 1554, being possessed of that lease, made his will, and thereby devised divers legacies of plate and other goods to others; and afterwards therein devised "all the residue my goods, my debts and legacies paid unto *Margaret* my wife, whom I make my sole executrix, to see my will "performed; and I make *Henry Portman* my overseer." *Robert* dies; the *feme* enters generally, and deviseth that term to *James Hill*; and dieth before the debts paid. *James* enters by the executor's assent, and was a suitor to the bishop of *Winchester*, that he might surrender it to the use of *Symms* and his heirs, who agreed thereto. Afterwards *James Hill* in the court of the manor of *Taunton* (whereof this land was parcel) surrendered it to the

8. C. Gould. 129. 8. C. Moor, 352. Yelv. 68. Dyer, 5. 2 Roll. Abr. 58. 734. 5. Co. 109. Co. Lit. 118. b. 1. Leon. 193. Sheph. Touch. 94. 1. Bro. Cas. Ch. 127.

steward

steward there, to the use of *Symms* and his heirs *in perpetuum*; and afterwards the bishop agreed to that surrender, and let that land to the plaintiff. The defendant as a servant to *Symms* entered. *Et si super totam materiam, &c.*

PORTMAN *against* WILLIS.

The first point moved was, Whether by the devise of *omnia bona*, this lease for years did pass; for it was moved, that it was intended only of chattels personal, but not of real; and in proof thereof, 4. *Edw.* 6. "*Grants*," 51. was cited, where by the grant of *omnia bona* leases do not pass. But *catalla* comprehends as well real as personal, as *Stanford* 45. and the law regards this diversity betwixt them; for the writ of *fieri facias* and other writs mention *bona et catalla*, which they would not do, if *bona* comprehended both.

Secondly, When the *feme* entered generally, whether she shall be said to be in as legatary, or as executrix; for if she took it as executrix, her devise thereof is void. See Moor, 352.

Thirdly, Whether this surrender into the hands of the steward, to the use, &c. and the lessor agreeing thereto, be a good surrender to extinguish the term, although it be a void limitation of the use. See Moor, 352, where it is said the surrender was adjudged to be good.

GAWDY. By the grant of *omnia bona mobilia et immobilia*, leases for years passed: so likewise it is of the grant of *omnia bona* in general; and 39. *Hen.* 6. *pl.* 35. is, that a man had rent for years, and granted *omnia bona sua*; and it was held that the rent passed: and 7. *Hen.* 4. is, that an executor shall have an *ejectione firmæ* by the equity of the statute of 4. *Edw.* 3. *de bonis asportatis, &c.* so the law accounts of them as goods. Ante, 377. 1. Leo. 193.

But POPHAM and CLENCH held, that 4. *Edw.* 6. is law in this point, that by the grant of *omnia bona* leases pass not; but they conceived that in wills they may well pass; for it is a legacy whereof the civilians are judges; and they hold that *bona* comprehends all chattels; and we in this point ought to judge according to their law.

For the second point GAWDY and POPHAM held, that she ought to have made her election before she had it as legatary, especially as this case is, it being given by the name of the residue; so as she ought to have shewn that there was sufficient to satisfy all debts and legacies over and besides that lease, and that she would have it by the name of the residue; and it is here found that she died before all the debts of the devisor were paid, so as she cannot have it as the residue until they be paid or satisfied. Ante, 348.

For the third point, of the surrender, they said little thereto. GAWDY only conceived that it was not any surrender; for it was never intended to surrender to extinguish it, but to grant it to an use, which if it takes not effect, it is void to all purposes to make a surrender. *Et adjournatur.* Co. Lit. 218. b.

May *against* Alvares.

CASE 10.

ASSUMPSIT. And declares, Whereas the defendant was possessed *de diversis bonis* of the plaintiff, that the defendant, in consideration the plaintiff would forbear the goods, promised to deliver them within six months; and alledgeth *in facto* that he did forbear them for six months, and that the defendant had not yet delivered them. Upon *non assumpsit* pleaded, and found for the plaintiff, it was moved in arrest of judgment,—FIRST, That there was not any consideration, for it is that he should forbear; and he

Assumpsit to deliver goods in six months, in consideration of forbearance, is sufficient, without alledging the forbearance was for six months, or without shewing what species of goods.—Ante, 380. Post. 455. Hob. 216. Cro. Jac. 683. 1. Roll. Ab. 27. Moor, 854. 3. Bulf. 207. 1. Sid. 45. Strange, 94.

May *against* Alvarez.

doth not shew for what time, which is not any consideration; for so he might forbear but for a quarter of an hour: and although it be alledged, that he forbear for six months, that helps not the consideration alledged.—Secondly, He doth not shew what goods they were, and so uncertain.

But THE COURT held it to be well enough, notwithstanding these exceptions. For as to the first, it is a sufficient consideration that he forbear; and he ought to shew for what time he forbore it: and when the defendant saith, that he would deliver them within six months, therein is implied, that the other should forbear them for six months; and therefore it is sufficiently shewn that he forbore them for six months. Secondly, there need not any certainty of the goods to be shewn; for he is not to recover them in specie, but damages, &c. Wherefore it was adjudged for the plaintiff.

CASE 21.

Barton *against* Lever and Brownlow,

WHO WERE RECOVERORS FOR SIR RICHARD SHUTTLEWORTH.

Easter Term, 23. Eliz. Roll 396.

If tenant in tail levies an erroneous fine, and the conusee suffers a common recovery, in which the tenant in tail comes in as a common vouchee; the recovery shall bar the tenant in tail and his issue of a writ of error to reverse the fine, and the recoveror may plead the recovery in bar of the writ of error.

Post. 420.

Poph. 100. Moor, 365. 125. 2. Roll. Ab. 394. Pigot on Recov. 140. 1. Bl. Rep. 222. Dougl. 25. 45. 483.

ERROR. The case was, That *R. Barton*, tenant in tail, levied an erroneous fine in 7. *Eliz.* and afterwards upon the 10. *March*, 11. *Eliz.* (which was the first week in *Lent*) a writ of entry was brought against the conusee, returnable *die Lunæ quarta septimana quadragesima proxim' futur'*; *et in die Lunæ quarta septimana quadragesimæ* of the same *Lent*. The conusee appeared and vouched *R. Barton*, who entered into the warranty and vouched over; and so a recovery was suffered. *R. B.* dies; the issue in tail brings error to reverse the fine; this recovery was pleaded in bar; and it was thereupon demurred.

ATKINSON argued *for the defendant*, that it was a good bar to the writ of error.—THE FIRST QUESTION was, Whether this entry into warranty, and so a voucher over, and so a recovery had, be a bar to the issue in tail to have a writ of error of the fine? And he held that it was: for by entering into warranty generally a man shall lose all rights and all actions which he hath to the land, all rents, all conditions, and every other benefit which he may have thereto; and for that purpose 2. *Edw.* 2. "*Voucher*," 208. and 7. *Edw.* 2. "*Voucher*," that rent is gone by a general entry into warranty: so 3. *Edw.* 3. *pl.* 51. 5. *Edw.* 3. *pl.* 11. that a condition is gone; so 50. *Edw.* 3. that his action is gone, although he would save it by protestation; and 13. *Assise*, *pl.* 1. that a *baron* by his entry into warranty with his *feme* shall lose his own action: 19. *Hen.* 6. by a partition betwixt coparceners, the writ of error is gone. And although it were said that this writ of error is but only an examination of the record, which is not gone by the entry into warranty, that is not so; for by his entry into the warranty, his title to have restitution is gone: and if he should reverse that fine, he is to have restitution; so by consequence the land is demanded, which is gone by this entry into warranty, and voucher over.—SECONDLY, Whether this recovery were good, or but voidable or merely void? which rested only whether these words "*proxim' futur'*" shall refer to the *Lent* after following; for if so, here is a recovery suffered before the return of the writ: and he held that it should refer to *die Lunæ* in *quarta septimana* in the same *Lent*, and shall not refer to *quadragesimæ*, although it were last

last mentioned: for *relatio* shall not be *ad proximum antecedens* in all cases; and in proof thereof vouched 22. *Edw.* 3. and 28. *Hen.* 8. *Bould's Case* was cited to that purpose (*a*).

FRETON *against* LEVER, &c.

HUTTON *è contra* to the first. He conceived it is not any bar, because by the fine he had neither *jus in re nec ad rem*; and then this intended recompence cannot go to this title in tail which he had not; and to this writ of error the issue in tail is entitled, and is not to be barred by any act of his ancestors. And therefore 2. & 3. *Eliz. Dyer*, 188. tenant in tail releaseth errors, and after is barred in a writ of error, it shall not bind the issue in tail. *F. N. B.* 108. *F.* Tenant in tail brings an attaint and is nonsuited, yet the issue shall have the attaint: and here he hath not any right to the land by the fine levied with proclamations; wherefore he cannot have any recompence in value to bar it. And therefore 25. *Eliz.* it was adjudged in *Lord Norris v. Braybroch*, that where tenant in tail was, remainder over in tail to *Lionel Norris*, the tenant in tail suffered an erroneous recovery, and died without issue, *Lionel* in remainder was attainted of treason, and all his lands, rights, actions to land, were given by parliament to the queen, and afterwards he was restored in blood. This title to have a writ of error was not thereby given to the queen; for it was not an action nor right to the land, but a cause to examine the record (*b*). Wherefore, &c.—As to the second, he conceived that of necessity *futur'* ought to refer to *quadragesima*, and not to *quarta septimana*: and therefore there is an apparent fault in the writ, and it is merely void; for it is suffered by them who have not any day in court; for they come in and suffer this recovery a year before the writ is returnable; for the writ bears *teste in prima septimana quadragesimæ*, and it is returnable *die Lunæ quarta septimana quadragesimæ proxime futur'*; which words of necessity ought to refer to *quadragesimæ*, and not to *die Lunæ*, nor to *quarta septimana*: for the rule is, *ad proximum antecedens fiat relatio*; and in proof thereof relied upon 4. *Edw.* 3. 3. 16. *Edw.* 3. *B. R.* 652. 5. *Eliz.* 224. and 23. *Eliz.* 376. Wherefore this recovery is erroneous for this apparent fault in the record, and so no bar of the writ of error.

(*b*) 3. Co. 2. 1. Leon. 270. Moor, 125. Hob. 340. Cro. Car. 428. 2. Hawk. 642.

But afterwards THE WHOLE COURT resolved for the defendant in both points. For to the first, when tenant in tail levies an erroneous fine, he hath yet a right in the land, which by his entry into the warranty, and receiving thereby an intended recompence in value, is barred: for although tenant in tail cannot by deed release errors to bar the issue in tail; for as he is entitled to the land, so he is to the writ of error, which tenant in tail cannot release or extinguish no more than he can give the land; yet as by fine or recovery he may bar the tail itself, so he may bar the writ of error: and here when he enters into the warranty, and vouches over, and hath recompence, he is in by his warranty of all estates; and the recompence in value is a sufficient bar for all estates and rights: and as that shall be a bar for the land itself, so shall it bar his action also, and give away all his right to the land.

AND TO THE SECOND MATTER they held, that this recovery is not void nor erroneous; for these words *proxim' futur'* shall not be referred to *quadragesima*, but to *die Lunæ quarta septimana*: for these words *proxim' futur'* being written in a short hand, are intention shall be construed *ut res magis valeat quàm pereat*. 1. Bl. Rep. 223. Cruise on Recov. 17. Bigot on Recov. 169.

In a variance between a writ of entry and its return, words of uncertain relation

(*a*) See 23. Eliz. c. 3.

Barton *againſt* Lever, &c.

different to which they ſhall be referred: and if it be conſtrued *proxima futura*, then it agrees well with *quarta ſeptimana*; and if it be *proximo futuro;* then it agrees well with *die Lunæ*; ſo in theſe two ſenſes it may be conſtrued that the recovery ſhall be good: but if it be *proxime futuræ*, then that refers to *quadrageſimæ*, and the recovery is void, for that it was a judgment upon the voucher, and a recovery in value before the writ was returned, which cannot be. We muſt then conſtrue it in ſuch a manner, *ut res magis valeat quàm pereat*, and according to both their intendment, and according to what ſeemeth moſt likely: for it is not to be ſuppoſed that either the plaintiff or Court intended, that the writ which was ſued for his benefit ſhould be made returnable a year after: the precedents alſo have been there viewed, whereof divers of them are in this manner; whereunto regard ought to be had, that they be not conſtrued to be void and erroneous, when by any conſtruction they may be made good. Wherefore, for theſe reaſons, in *Mich.* 37. and 38. *Eliz.* they all delivered their opinions abſolutely for the defendant.

Popham ſaid, he would have the auditors and ſtudents to obſerve theſe points agreed by the Court. Firſt, That a recovery had after an erroneous fine, ſhall bar the iſſue in tail from having a writ of error to reverſe that fine. Secondly, That a recovery, although erroneous, ſhall bar alſo a writ of error of the fine until it be reverſed. Thirdly, That a recovery which is void is not any bar. Fourthly, That the recovery here is not void nor erroneous, becauſe the writ ſhall be intended returnable the ſame *Lent*. Wherefore, &c. But there was never any judgment entered in this caſe, becauſe the parties were moved to compound.

1. Roll. Ab. 789.

Case 12.

Pearce *againſt* Bacon.

If a copyholder claims common againſt a ſtranger, he muſt alledge preſcription in the lord; If againſt the lord himſelf, he muſt alledge it by way of uſage. Ante, 353. Poſt. 531. 4. Co. 31. b. Moor, 461. Lut. 1327. 6. Co. 60. Salk. 170.

ACTION upon the caſe for diſturbing him in uſing his common; and where *uſitatum fuit, &c. infra manerium prædictum*, that every copyholder within the manor ſhould have common in ſuch a waſte of the lord's, for two ſheep for every acre of arable land; and that the defendant being lord there, had digged holes and burrows therein for conies, and ſo had diſturbed him of his common. After not guilty pleaded, and found for the plaintiff, it was alledged in arreſt of judgment, that this preſcription for a copyholder againſt his lord is not allowable: for every preſcription by a copyholder to have common ought to be, that the lord hath had for him and his tenants, &c. ſo he cannot preſcribe in this manner.

But all the Court reſolved, that the preſcription was good; for there is difference where he preſcribes againſt a ſtranger; there he ought to alledge the preſcription in the lord; but where he preſcribes againſt the lord himſelf, he ought to alledge it by way of uſage: and although in ancient time they were accounted only but as tenants at will, and ſo might not preſcribe againſt their lord, yet now they be accounted in an high regard, and as well as they may preſcribe for their eſtate in the land itſelf againſt the lord, ſo may they do for collateral things for the benefit of their eſtates; as common, &c. Wherefore it was afterwards adjudged accordingly for the plaintiff.

Atkinſon

Atkinson *against* Atkinson.

CASE 13.

DETINUE of goods. The plaintiff had judgment, and after the year sued a *scire facias* to have execution. The defendant pleaded, that upon a writ of *distringas* awarded to the sheriff upon that judgment, he delivered such goods to the sheriff; and for the residue, that they were appraised at so much by an inquisition taken by the sheriff, and that he delivered the money to the sheriff; but he doth not aver this matter to be returned by the sheriff. Hereupon exception was taken, that this was not a plea to extort execution upon such a surmise.

Upon a *scire facias* to obtain execution, if the defendant plead that he delivered *goods* and *money* to the sheriff in satisfaction of the judgment, the plaintiff *shall* join issue on the fact; but if the jury find as to the *goods*, and are silent as to the *money*, it is a mis trial. Ante, 238. Moor, 402. 2. Ld. Raym. 1072. 1. Salk. 320.

And of that opinion at the first was POPHAM, *Chief Justice*; for then by such a feigned plea, any one who hath judgment to recover a debt, shall never have execution.—But GAWDY held, that he very well may plead it; for otherwise the defendant should be prejudiced; for he might have twenty several executions served against him upon one judgment; and he should be put to his remedy against the sheriff only, who peradventure is not worth it: and it is a lesser mischief to enforce the plaintiff, if his plea be true, to take his action for it against the sheriff; and if it be not true, to take issue thereupon.—Afterward it being moved again, all THE COURT was of that opinion; whereupon he took issue accordingly. 44. *Edw.* 3. 18. 20. *Hen.* 6. 24. 21. *Hen.* 6. 5. 19. *Edw.* 3. "*Scire Facias*", 120. And afterwards issue being joined, the jury found for the plaintiff that the goods were not delivered, but nothing concerning the payment. And it was held for that cause to be an ill trial, and that the plaintiff could not have judgment for that which was found, but that he ought to try it *de novo*.

Easter Term,

37. Eliz. In the Common Pleas.

Sir Edmund Anderson, *Knt. Chief Justice.*
Francis Beaumond, *Esq.*
Thomas Walmsley, *Esq.* } *Justices.*
Thomas Owen, *Esq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

Clun *against* Pease *and* Turner.

CASE 14.

Michaelmas Term, 36. & 37. *Eliz. Roll* 1817.

TRESPASS. It was found by special verdict, that the place WHERE is parcel of the manor of *Brettenhall* in *Essex*, and copyhold land demisable in fee, in tail, or for life; and that one *Henry Smith* was a copyholder thereof in tail, the remainder to *Edward Smith* in tail; and suffered a recovery with common voucher in a plaint, in nature of a writ of entry, in the court of the manor (and that under it the plaintiff claimed); and that afterwards he died without issue; and that the defendant in right of *Smith* entered: and further they found, *quòd nulla fuit consuetudo pro communibus recuperationibus ante usitat.* within the said manor. *Et si, &c.*

Where by custom a copyhold may be intailed, it may also be barred by a common recovery suffered in the lord's court. Ante, 372. 380. Post. 717. 1. Roll. Ab. 506. 4. Co. 23. a. Carth. 23. 459. 1. Wilf. 26.

Co. Lit. 60. 1. Roll. Rep. 49. Kitchen, 176. Moor, 358. 753. Salk. 340. Stiles, 450. Gilb. Ten. 167. Strange, 1197. Wilf. 26. 2. Vez. 596. Burr. 669. 1. Bac. Ab.

CLUN *against* PEASE and TURNER.

WARBERTON, *for the defendant.* It is first found expressly, that it is an estate tail, and then it is not barred by this recovery. First, A warrant cannot be annexed to a copyhold; for he to whose use the surrender is made, is in by the lord; and he who would have a warranty, ought of necessity to be in by the party. Secondly, A warranty is at the common law, and the estate in the land is by copyhold and custom; and therefore the warranty cannot be annexed thereto: for those estates are created, and they are *demesnes*, and to be defeated by the custom of the manor; and therefore there shall not be a tenancy in dower, nor by the courtesy of them without a special custom: then without a warranty there cannot be any voucher nor recovery in value; and without a recovery in value there cannot be any bar to the issue in tail. Wherefore, &c.

GLANVILE held, that it should bind. Writs of entry are allowable, be they with title or without title: and there are ancient precedents, that there have been recoveries there in nature of real actions and receipts, and other courses as at the common law. And the lord-keeper who now is, about twenty-six years since, purchased a copyhold within the manor of *Cashiobury*, in the county of *Herts*, which was entailed, and upon great advice he was to have a recovery. And whereas it was said that warranty cannot be annexed, true it is it cannot be annexed at the time of the surrender; but it well may be by a release or confirmation afterwards: and admitting it could not be, yet none could counterplead it but the vouchee; and if he enters willingly into the warranty, that shall bind him when the recovery is had: and if it be not good to bind *in perpetuum*, yet clearly it is a discontinuance. Wherefore, &c.

But all THE JUSTICES held, that this recovery should not bind the issue in tail; for it shall not bind upon an expectancy of a recovery in value, which is the reason that it binds for land at the common law: and here he cannot have any land in value; for he cannot have any land at the common law: and he cannot have customary land; for if it should be so conveyed, the lord thereby should lose his fine; and one should hold his land as a copyholder without admittance or grant from the lord; which is contrary to the nature of copyhold, and contrary to the prescription, which is to hold by copy, &c. But it is a discontinuance clearly, which cannot be defeated by entry. Wherefore they gave day to speak to that point.—Afterwards it was adjudged for the plaintiff. But *quære*, Whether upon the principal matter or not? *Vide Hill. 37. pl. 17.*

Ante, 380.

CASE 2.

Brown *against* Foster.

Michaelmas Term, 36 & 37. Eliz. Roll 2892.

If a surrender be made to the use of another without expressing what estate he shall have; a custom that the lord may grant it in fee to him to whose use the surrender is made, is a good custom; but it must be pleaded that he had *used* to do it. Kitch. 81. Co. Cop. 95. Pop. 125. Cro. Jac. 434. Cro. Car. 205. 4. Co. 29. b.

REPLEVIN. The defendant avows for *damage-feasant*. The plaintiff makes title as copyholder, and shews that within the manor of *A.* time whereof, &c. *talis habebatur et habetur consuetudo*, that any copyholder of the manor may surrender in any place within the manor into the hands of two of the copyhold tenants, &c. AND THAT there is another custom, that if any surrender to the use of another, without expressing any estate, that the lord may

Brown *againſt* Foster.

grant it in fee to him to whoſe uſe the ſurrender was made. And the plaintiff by copy (granted in this manor) made his claim. The defendant thereupon demurred.—But note, that the defendant in his avowry claimed by copy granted by the ſteward of the manor; but he doth not expreſs the ſteward's name.

Williams, *for the defendant*, moved, Firſt, That the firſt cuſtom is not well pleaded, for it is pleaded by uſage and cuſtom; but he doth not plead that ever it was put in ure in that manor, which ought to be alledged. 21. *Edw.* 4. *pl.* 28. and 22. *Edw* 48. And ſo it was held in this court in *Sir William Hatton's Caſe*, where it was pleaded, *quòd talis habebatur conſuetudo*, within a manor, *quòd licebit ſeneſchallo* to impoſe a fine, &c. And the ſecond cuſtom is unreaſonable and void; for it is to limit and charge the land with a greater eſtate than the copyholder gave, which is unreaſonable, the lord being but the perſon and means of conveying it, &c.

Yelverton *è contra*. Firſt, The avowry is ill, becauſe he claims by copy granted by the ſteward; and he doth not ſhew his name, which is iſſuable. And as to the cuſtom, it is good and reaſonable when a copyholder ſurrenders and ſhews not any eſtate, that the lord may grant it in fee to him to whom the ſurrender was made; for he is a chancellor in his own court to diſpoſe thereof when the tenant leaves it uncertain: and therefore it was ruled here, *Lippingwell v. Bunting*, that where a copyholder bargained and ſold his copyhold (but he ſhewed not what eſtate), and ſurrendered it to the uſe of the bargainee, and the lord granted it to the bargainee in fee, it was good, and the bargainee ſhould retain it in fee.

And of that opinion was the whole Court in this caſe, that this cuſtom was good and allowable being uſed; ſo as when the tenant doth not appoint the eſtate of *ceſty que uſe*, that the lord may: the intereſt of the land being betwixt the lord and the copyholder, it is not unreaſonable that upon ſuch an incertainty the lord ſhould aſcertain it. But for the plea they held, that the firſt cuſtom was not well pleaded; for it is not ſufficient to alledge a cuſtom that one might do ſuch an act, but that he uſed to do it; as to alledge *dimiſibile et dimiſſum*, &c. They alſo all agreed, that the not naming of the ſteward made the avowry to be ill: and then they held, that the avowry being ill, although the bar to the avowry were ill, yet he cannot have return: whereupon the parties agreed to plead *de novo*; and ſo the matter in law was not reſolved.

Ardern *againſt* Darcy.

Case 3.

Waste. The plaintiff prayed *a writ of eſtreapment* againſt the tenant and his ſervants.—Anderson doubted, whether it lay or no, becauſe the plaintiff is therein to recover his damages. But Walmsley and Beaumond held clearly, that it well lies: for it may be the damages are more than the tenant can recompenſe if he had deſtroyed the houſe and woods; and they relied upon 4. *Edw.* 3. *pl* 32. 12. *Rich.* 2. "*Eſtreapment*" *plac' ultimo, et F. N. B.* 61. which authorities are directly, that an *eſtreapment* lies in this action.—And Brownlow, *the prothonotary*, ſaid, that there was not any precedent, as he remembered, that it had been awarded

A writ of *eſtreapment* awarded in an action of waſte. Poſt. 484. 774. 52 *Hen.* 3. c. 23. 5. Co. 115. 6. *Edw.* 1. c. 5. Co. Lit. 53. 6. *Edw.* 1. c. 13. 2. Inſt. 328.

ARDERN *against* DARCY.

awarded in a writ of waſte; but he ſaid he could ſhew precedents where it was awarded in a writ of entry *ſur diſſeiſin*. And THE COURT ſaid, they were all one; for there damages are recoverable. THE COURT alſo commanded them to ſearch precedents, whether it lay againſt ſervants; for they doubted thereof. But it was afterwards awarded (*a*).

(*a*) Beſides this *preventive* redreſs at common law, the courts of equity upon a bill exhibited therein complaining of *waſte* and *deſtruction* will grant an injunction.

CASE 4.

Vaughan *againſt* Beal.

Prohibition does not lie for ſuing in the ſpiritual court for tithes of lands holden of the crown in *capite*.

PROHIBITION being prayed for ſuing in the ſpiritual court, for the tithes of lands holden of the queen *in capite*; it was now moved, that conſultation ſhould be awarded, for that there is not any cauſe to grant a prohibition; for then he never ſhould have any remedy for them: for if he may not ſue for them in the ſpiritual court, he cannot ſue for them here.—And all THE COURT held, that a prohibition lay not: for although *N. B. R.* 401. is, that a prohibition lies in this caſe, yet that is to be intended where it is ſued in chancery, where peradventure they may give remedy for the tithes. But becauſe they were informed, that there are the like precedents in the queen's bench, they ſaid, they would further adviſe.

CASE 5.

Hutchinſon *againſt* Lewſon.

In debt on bond conditioned to ſave the plaintiff harmleſs, the defendant muſt ſhew that he was not damaged, or that he had ſatisfied the condition. Ante, 253.

Cowp. 47.

DEBT upon an obligation conditioned. WHEREAS the plaintiff was obliged in ſuch obligations for the defendant, that if he were charged or moleſted in his body or goods for thoſe obligations, he would within a month ſatisfy him for it; the defendant ſaith, that he had paid him ſuch a ſum for all his charges within a month. It was thereupon demurred.—And without argument it was adjudged for the plaintiff; for he ought to ſhew how the plaintiff was moleſted, and that he had ſatisfied ſo much; or that he was not moleſted: as if one be obliged, that he ſhall make ſuch aſſurance as the plaintiff's counſel ſhall deviſe; it is not ſufficient to ſay that he made ſuch an aſſurance, but he ought to ſay that the plaintiff's counſel deviſed ſuch an aſſurance, which he had made. Wherefore, without further argument, it was adjudged for the plaintiff. *Vide* 5. *Edw.* 4. *pl.* 8. 22. *Edw.* 4. *pl.* 15. 35. *Hen.* 6. *pl.* 10.

CASE 6.

Ward *againſt* Lambert.

Hilary Term, 35. *Eliz. Roll* 34.

A bargain and ſale "*for divers cauſes and conſiderations*" without money, is not good; tho' it be recited the bargainee was bound by recognizance for the bargainor.

UPON a ſpecial verdict the caſe was, That one by indenture, reciting, "That whereas *J. S.* was bound in a recognizance "and other bonds for him; now he, for *divers good conſiderations*, "bargained and ſold the lands to him and his heirs." The deed is inrolled within the ſix months (*a*), but it was found there was not any money paid: and, Whether this was a good BARGAIN AND SALE, or not? was the queſtion upon demurrer.

ANDERSON. Every owner of land may part with it as he pleaſeth, if it be according to law: and here it is not ſhewn that the bargain and ſale was becauſe the vendee was bound for him;

1. Ro. Ab. 783. 1. Leon. 170. 1. Co. 176. a. Vent. 137. 7. Co. 40. Cro. Jac. 127. Strange, 1225. Wilf. 91. 1. Wood's Con. 656. Gilb. Uſes, 29, 51. 84, 112. 253. 1. Vern. 137.

and

WARD *againſt* LAMBERT.

... it cannot be a good bargain and ſale. But if ... s, he might thereby have raiſed an uſe by ... not a bargain and ſale.

... y bargain and ſale there ought to ... lor here hath nothing for his land, ... might have riſen by way of cove- ... been apt words, *viz.* a covenant ... give land, or bargain or ſell land ... y.—And to that opinion the OTHER ... not good by way of bargain and ſale, ... conſideration to raiſe an uſe by way ... was adjudged accordingly.

See 27. Hen. 8. c. 16.

Anonymous.

CASE 7.

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The difference between the words *forſworn* and *perjured*. Ante, 135.

Cro. Car. 288.

Jackſon *againſt* Neal.

CASE 8.

Trinity Term, 36. Eliz. Roll 2987.

EJECTIONE FIRMÆ. It was found by ſpecial verdict, That the *Lord Hunſdon* was ſeiſed of the manor of *Paris-Garden* in the county of *Surrey*, wherein are divers copyholds, and made a leaſe of two of the copyholds and of the court baron for two thouſand years, ſaving to himſelf the other demeſnes and ſervices. The leſſees kept court there, and a copyholder ſurrenders to the uſe of *A.* in fee. *A.* obtains licence in court to let it for one and twenty years, from *Michaelmas* laſt paſt. He makes a leaſe afterward for one and twenty years to begin at *Chriſtmas* following to the plaintiff, who entered, and being ouſted by the defendant, brings an *ejectione firmæ*: and, Whether this were a good grant by copy, and this leaſe by the copyholder allowable or not? was the queſtion.—And all THE COURT held, that it was a good copy: for ANDERSON ſaid, this caſe hath been often in queſtion; for it was the caſe of *Lord Hatton* for his tenants of *Wellingborough*, and of divers others ſince that time. And it hath been oftentimes held, that the Court may well continue as to that purpoſe for admittance of copyholders; for otherwiſe every one of his own act might deſtroy his copyholder's eſtate.

If the lord of a manor grants the inheritance of all the copyholds, the grantee ſhall hold cuſtomary courts, &c. Ante, 39. 103. 4. Co. 26. b. 2. Leon. 208. 2. Com. Dig. 486. Gilb. Ten. 209. 211. 2. T. Rep. 415.

AND SECONDLY, They conceived that the leaſe is not warranted by this licence, and then no *ejectione firmæ* lies upon this leaſe.—Afterwards in *Trin.* 37. *Eliz.* judgment was given for the defendant upon this point of the leaſe.

A copyholder muſt purſue his licence to leaſe. Ante, 288. Poſt. 462.

Owen, 73. Moor, 184. Cro. Jac. 437. 2. Com. Dig. 510. Gilb. Ten. 297. Dougl. 53. 292. 565. 1. T. Rep. 705. 2. Term Rep. 241. 380. 781.

Trinity

ARDERN *against* DARCY.

awarded in a writ of waste; but he said he could shew precedents where it was awarded in a writ of entry *sur disseisin*. And THE COURT said, they were all one; for there damages are recoverable. THE COURT also commanded them to search precedents, whether it lay against servants; for they doubted thereof. But it was afterwards awarded (*a*).

(*a*) Besides this *preventive* redress at common law, the courts of equity upon a bill exhibited therein complaining of *waste* and *destruction* will grant an injunction.

CASE 4.

Vaughan *against* Beal.

Prohibition does not lie for suing in the spiritual court for tithes of lands holden of the crown in *capite*.

PROHIBITION being prayed for suing in the spiritual court for the tithes of lands holden of the queen *in capite*; it was now moved, that consultation should be awarded, for that there is not any cause to grant a prohibition; for then he never should have any remedy for them: for if he may not sue for them in the spiritual court, he cannot sue for them here.—And all THE COURT held, that a prohibition lay not: for although *N. B. R.* 401. is, that a prohibition lies in this case, yet that is to be intended where it is sued in chancery, where peradventure they may give remedy for the tithes. But because they were informed, that there are the like precedents in the queen's bench, they said, they would further advise.

CASE 5.

Hutchinson *against* Lewson.

In debt on bond conditioned to save the plaintiff harmless, the defendant must shew that he was not damaged, or that he had satisfied the condition. Ante, 253. Cowp. 47.

DEBT upon an obligation conditioned. WHEREAS the plaintiff was obliged in such obligations for the defendant, that if he were charged or molested in his body or goods for those obligations, he would within a month satisfy him for it; the defendant saith, that he had paid him such a sum for all his charges within a month. It was thereupon demurred.—And without argument it was adjudged for the plaintiff; for he ought to shew how the plaintiff was molested, and that he had satisfied so much; or that he was not molested: as if one be obliged, that he shall make such assurance as the plaintiff's counsel shall devise; it is not sufficient to say that he made such an assurance, but he ought to say that the plaintiff's counsel devised such an assurance, which he had made. Wherefore, without further argument, it was adjudged for the plaintiff. *Vide* 5. *Edw.* 4. *pl.* 8. 22. *Edw.* 4. *pl.* 15. 35. *Hen.* 6. *pl.* 10.

CASE 6.

Ward *against* Lambert.

Hilary Term, 35. *Eliz. Roll* 34.

A bargain and sale "*for divers causes and considerations*" without money, is not good; tho' it be recited the bargainee was bound by recognizance for the bargainor. 3. Ro. Ab. 783. 1. Leon. 170. 1. Co. 176. a. Vent. 137. 7. Co. 40. Cro. Jac. 127. Strange, 1128. Wilf. 91. 1. Wood's Con. 656. Gilb. Uses, 29, 51. 84, 112. 253. 1. Vern. 137.

UPON a special verdict the case was, That one by indenture, reciting, "That whereas *J. S.* was bound in a recognizance "and other bonds for him; now he, for *divers good considerations*, "bargained and sold the lands to him and his heirs." The deed is inrolled within the six months (*a*), but it was found there was not any money paid: and, Whether this was a good BARGAIN AND SALE, or not? was the question upon demurrer.

ANDERSON. Every owner of land may part with it as he pleaseth, if it be according to law: and here it is not shewn that the bargain and sale was because the vendee was bound for him;

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and if he were, yet it cannot be a good bargain and ſale. But if there had been apt words, he might thereby have raiſed an uſe by way of covenant, but clearly not a bargain and ſale. WARD *againſt* LAMBERT

WALMSLEY *accord.* In every bargain and ſale there ought to be a *quid pro quo.* But the vendor here hath nothing for his land, and therefore it is void, but it might have riſen by way of covenant; but there ought to have been apt words, *viz.* a covenant to ſtand ſeiſed to uſes: for if I give land, or bargain or ſell land to my ſon, no uſe ariſeth thereby.—And to that opinion the OTHER JUSTICES inclined, that it is not good by way of bargain and ſale, but that it had been a good conſideration to raiſe an uſe by way of covenant. Wherefore it was adjudged accordingly.

(*a*) See 27. Hen. 8. c. 16.

Anonymous.

CASE 7.

ACTION upon the caſe was brought for theſe words: "Thou "art forſworn, and I will make thee ſtand on the pillory, or elſe "it ſhall coſt me a hundred pounds."—*Et per* TOTAM CURIAM, an action lies not; for ANDERSON ſaid, there is a great difference betwixt the words "forſworn" and "perjured." For "forſworn" is, where he ſwears againſt the truth in ordinary diſcourſe; but *perjurium eſt quando jus alterius pervertitur*, which is to be intended in a judicial proceeding. And this difference hath been allowed of: *quod* CURIA *conceſſit.* But to ſay, "he was forſworn in ſuch a "court," or betwixt ſuch parties, an action lies. Wherefore it was adjudged for the defendant.

The difference between the words *forſworn* and *perjured.* Ante, 135.

Cro. Car. 288.

Jackſon *againſt* Neal.

CASE 8.

Trinity Term, 36. Eliz. Roll 2987.

EJECTIONE FIRMÆ. It was found by ſpecial verdict, That the *Lord Hunſdon* was ſeiſed of the manor of *Paris-Garden* in the county of *Surrey*, wherein are divers copyholds, and made a leaſe of two of the copyholds and of the court baron for two thouſand years, ſaving to himſelf the other demeſnes and ſervices. The leſſees kept court there, and a copyholder ſurrenders to the uſe of *A.* in fee. *A.* obtains licence in court to let it for one and twenty years, from *Michaelmas* laſt paſt. He makes a leaſe afterward for one and twenty years to begin at *Chriſtmas* following to the plaintiff, who entered, and being ouſted by the defendant, brings an *ejectione firmæ*: and, Whether this were a good grant by copy, and this leaſe by the copyholder allowable or not? was the queſtion.—And all THE COURT held, that it was a good copy: for ANDERSON ſaid, this caſe hath been often in queſtion; for it was the caſe of *Lord Hatton* for his tenants of *Wellingborough*, and of divers others ſince that time. And it hath been oftentimes held, that the Court may well continue as to that purpoſe for admittance of copyholders; for otherwiſe every one of his own act might deſtroy his copyholder's eſtate.

If the lord of a manor grants the inheritance of all the copyholds, the grantee ſhall hold cuſtomary courts, &c. Ante, 39. 103.

4. Co. 26. b. 2. Leon. 208. 2. Com. Dig. 486. Gilb. Ten. 209. 211. 2. T. Rep. 415.

AND SECONDLY, They conceived that the leaſe is not warranted by this licence, and then no *ejectione firmæ* lies upon this leaſe.—Afterwards in *Trin.* 37. *Eliz.* judgment was given for the defendant upon this point of the leaſe.

A copyholder muſt purſue his licence to leaſe. Ante, 288. Poſt. 462.

Owen, 73. Moor, 184. Cro. Jac. 437. 2. Com. Dig. 510. Gilb. Ten. 297. Dougl. 53. 292. 565. 4. T. Rep. 705. 2. Term Rep. 241. 380. 781.

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ARDERN *against* DARCY.

awarded in a writ of waſte; but he ſaid he could ſhew precedents where it was awarded in a writ of entry *ſur diſſeiſin*. And THE COURT ſaid, they were all one; for there damages are recoverable. THE COURT alſo commanded them to ſearch precedents, whether it lay againſt ſervants; for they doubted thereof. But it was afterwards awarded (*a*).

(*a*) Beſides this *preventive* redreſs at common law, the courts of equity upon a bill exhibited therein complaining of *waſte* and *deſtruction* will grant an injunction.

CASE 4.

Vaughan *againſt* Beal.

Prohibition does not lie for ſuing in the ſpiritual court for tithes of lands holden of the crown in *capite*.

PROHIBITION being prayed for ſuing in the ſpiritual court, for the tithes of lands holden of the queen *in capite*; it was now moved, that conſultation ſhould be awarded, for that there is not any cauſe to grant a prohibition; for then he never ſhould have any remedy for them: for if he may not ſue for them in the ſpiritual court, he cannot ſue for them here.—And all THE COURT held, that a prohibition lay not: for although *N. B. R.* 401. is, that a prohibition lies in this caſe, yet that is to be intended where it is ſued in chancery, where peradventure they may give remedy for the tithes. But becauſe they were informed, that there are the like precedents in the queen's bench, they ſaid, they would further adviſe.

CASE 5.

Hutchinſon *againſt* Lewſon.

In debt on bond conditioned to ſave the plaintiff harmleſs, the defendant muſt ſhew that he was not damaged, or that he had ſatisfied the condition. Ante, 253. Cowp. 47.

DEBT upon an obligation conditioned. WHEREAS the plaintiff was obliged in ſuch obligations for the defendant, that if he were charged or moleſted in his body or goods for thoſe obligations, he would within a month ſatisfy him for it; the defendant ſaith, that he had paid him ſuch a ſum for all his charges within a month. It was thereupon demurred.—And without argument it was adjudged for the plaintiff; for he ought to ſhew how the plaintiff was moleſted, and that he had ſatisfied ſo much; or that he was not moleſted: as if one be obliged, that he ſhall make ſuch aſſurance as the plaintiff's counſel ſhall deviſe; it is not ſufficient to ſay that he made ſuch an aſſurance, but he ought to ſay that the plaintiff's counſel deviſed ſuch an aſſurance, which he had made. Wherefore, without further argument, it was adjudged for the plaintiff. *Vide* 5. *Edw.* 4. *pl.* 8. 22. *Edw.* 4. *pl.* 15. 35. *Hen.* 6. *pl.* 10.

CASE 6.

Ward *againſt* Lambert.

Hilary Term, 35. *Eliz. Roll* 34.

A bargain and ſale "*for divers cauſes and conſiderations*" without money, is not good; tho' it be recited the bargainee was bound by recognizance for the bargainor.

UPON a ſpecial verdict the caſe was, That one by indenture, reciting, "That whereas *J. S.* was bound in a recognizance "and other bonds for him; now he, for *divers good conſiderations*, "bargained and ſold the lands to him and his heirs." The deed is inrolled within the ſix months (*a*), but it was found there was not any money paid: and, Whether this was a good BARGAIN AND SALE, or not? was the queſtion upon demurrer.

ANDERSON. Every owner of land may part with it as he pleaſeth, if it be according to law: and here it is not ſhewn that the bargain and ſale was becauſe the vendee was bound for him;

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and if he were, yet it cannot be a good bargain and sale. But if there had been apt words, he might thereby have raised an use by way of covenant, but clearly not a bargain and sale. WARD *against* LAMBERT

WALMSLEY *accord.* In every bargain and sale there ought to be a *quid pro quo.* But the vendor here hath nothing for his land, and therefore it is void, but it might have risen by way of covenant; but there ought to have been apt words, *viz.* a covenant to stand seised to uses: for if I give land, or bargain or sell land to my son, no use ariseth thereby.—And to that opinion the OTHER JUSTICES inclined, that it is not good by way of bargain and sale, but that it had been a good consideration to raise an use by way of covenant. Wherefore it was adjudged accordingly.

(*a*) See 27. Hen. 8. c. 16.

Anonymous.

CASE 7.

ACTION upon the case was brought for these words: "Thou "art forsworn, and I will make thee flower the pillory, or else "it shall cost me a hundred pounds."—*Et per* TOTAM CURIAM, an action lies not; for ANDERSON said, there is a great difference betwixt the words "forsworn" and "perjured." For "forsworn" is, where he swears against the truth in ordinary discourse; but *perjurium est quando jus alterius pervertitur*, which is to be intended in a judicial proceding. And this difference hath been allowed of: *quod* CURIA *concessit.* But to say, "he was forsworn in such a "court," or betwixt such parties, an action lies. Wherefore it was adjudged for the defendant.

The difference between the words *forsworn* and *perjured.* Ante, 135. Cro. Car. 288.

Jackson *against* Neal.

Trinity Term, 36. *Eliz. Roll* 2987.

CASE 8.

EJECTIONE FIRMÆ. It was found by special verdict, That the *Lord Hunsdon* was seised of the manor of *Paris-Garden* in the county of *Surrey*, wherein are divers copyholds, and made a lease of two of the copyholds and of the court baron for two thousand years, saving to himself the other demesnes and services. The lessees kept court there, and a copyholder surrenders to the use of *A.* in fee. *A.* obtains licence in court to let it for one and twenty years, from *Michaelmas* last past. He makes a lease afterward for one and twenty years to begin at *Christmas* following to the plaintiff, who entered, and being ousted by the defendant, brings an *ejectione firmæ*: and, Whether this were a good grant by copy, and this lease by the copyholder allowable or not? was the question.—And all THE COURT held, that it was a good copy: for ANDERSON said, this case hath been often in question; for it was the case of *Lord Hatton* for his tenants of *Wellingborough*, and of divers others since that time. And it hath been oftentimes held, that the Court may well continue as to that purpose for admittance of copyholders; for otherwise every one of his own act might destroy his copyholder's estate.

If the lord of a manor grants the inheritance of all the copyholds, the grantee shall hold customary courts, &c. Ante, 39. 103. 4. Co. 26. b. 2. Leon. 208. 2. Com. Dig. 486. Gilb. Ten. 209. 211. 2. T. Rep. 415.

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A copyholder must pursue his licence to lease. Ante, 288. Post. 462.

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Trinity

ARDERN *against* DARCY.

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CASE 4.

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PROHIBITION being prayed for suing in the spiritual court, for the tithes of lands holden of the queen *in capite*; it was now moved, that consultation should be awarded, for that there is not any cause to grant a prohibition; for then he never should have any remedy for them: for if he may not sue for them in the spiritual court, he cannot sue for them here.—And all THE COURT held, that a prohibition lay not: for although *N. B. R.* 401. is, that a prohibition lies in this case, yet that is to be intended where it is sued in chancery, where peradventure they may give remedy for the tithes. But because they were informed, that there are the like precedents in the queen's bench, they said, they would further advise.

CASE 5.

Hutchinson *against* Lewson.

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DEBT upon an obligation conditioned. WHEREAS the plaintiff was obliged in such obligations for the defendant, that if he were charged or molested in his body or goods for those obligations, he would within a month satisfy him for it; the defendant saith, that he had paid him such a sum for all his charges within a month. It was thereupon demurred.—And without argument it was adjudged for the plaintiff; for he ought to shew how the plaintiff was molested, and that he had satisfied so much; or that he was not molested: as if one be obliged, that he shall make such assurance as the plaintiff's counsel shall devise; it is not sufficient to say that he made such an assurance, but he ought to say that the plaintiff's counsel devised such an assurance, which he had made. Wherefore, without further argument, it was adjudged for the plaintiff. *Vide* 5. *Edw.* 4. *pl.* 8. 22. *Edw.* 4. *pl.* 15. 35. *Hen.* 6. *pl.* 10.

CASE 6.

Ward *against* Lambert.

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and if he were, yet it cannot be a good bargain and sale. But if there had been apt words, he might thereby have raised an use by way of covenant, but clearly not a bargain and sale. WARD *against* LAMBERT

WALMSLEY *accord.* In every bargain and sale there ought to be a *quid pro quo.* But the vendor here hath nothing for his land, and therefore it is void, but it might have risen by way of covenant; but there ought to have been apt words, *viz.* a covenant to stand seised to uses: for if I give land, or bargain or sell land to my son, no use ariseth thereby.—And to that opinion the OTHER JUSTICES inclined, that it is not good by way of bargain and sale, but that it had been a good consideration to raise an use by way of covenant. Wherefore it was adjudged accordingly.

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The difference between the words *forsworn* and *perjured.* Ante, 135. Cro. Car. 288.

Jackson *against* Neal.

CASE 8.

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Trinity

ARDERN *against* DARCY.

awarded in a writ of waſte; but he ſaid he could ſhew precedents where it was awarded in a writ of entry *ſur diſſeiſin*. And THE COURT ſaid, they were all one; for there damages are recoverable. THE COURT alſo commanded them to ſearch precedents, whether it lay againſt ſervants; for they doubted thereof. But it was afterwards awarded (*a*).

(*a*) Beſides this *preventive* redreſs at common law, the courts of equity upon a bill exhibited therein complaining of *waſte* and *deſtruction* will grant an injunction.

CASE 4.

Vaughan *againſt* Beal.

Prohibition does not lie for ſuing in the ſpiritual court for tithes of lands holden of the crown in *capite*.

PROHIBITION being prayed for ſuing in the ſpiritual court, for the tithes of lands holden of the queen *in capite*; it was now moved, that conſultation ſhould be awarded, for that there is not any cauſe to grant a prohibition; for then he never ſhould have any remedy for them: for if he may not ſue for them in the ſpiritual court, he cannot ſue for them here.—And all THE COURT held, that a prohibition lay not: for although *N. B. R.* 401. is, that a prohibition lies in this caſe, yet that is to be intended where it is ſued in chancery, where peradventure they may give remedy for the tithes. But becauſe they were informed, that there are the like precedents in the queen's bench, they ſaid, they would further adviſe.

CASE 5.

Hutchinſon *againſt* Lewſon.

In debt on bond conditioned to ſave the plaintiff harmleſs, the defendant muſt ſhew that he was not damaged, or that he had ſatisfied the condition. Ante, 253. Cowp. 47.

DEBT upon an obligation conditioned. WHEREAS the plaintiff was obliged in ſuch obligations for the defendant, that if he were charged or moleſted in his body or goods for thoſe obligations, he would within a month ſatisfy him for it; the defendant ſaith, that he had paid him ſuch a ſum for all his charges within a month. It was thereupon demurred.—And without argument it was adjudged for the plaintiff; for he ought to ſhew how the plaintiff was moleſted, and that he had ſatisfied ſo much; or that he was not moleſted: as if one be obliged, that he ſhall make ſuch aſſurance as the plaintiff's counſel ſhall deviſe; it is not ſufficient to ſay that he made ſuch an aſſurance, but he ought to ſay that the plaintiff's counſel deviſed ſuch an aſſurance, which he had made. Wherefore, without further argument, it was adjudged for the plaintiff. *Vide* 5. *Edw.* 4. *pl.* 8. 22. *Edw.* 4. *pl.* 15. 35. *Hen.* 6. *pl.* 10.

CASE 6.

Ward *againſt* Lambert.

Hilary Term, 35. *Eliz. Roll* 34.

A bargain and ſale "*for divers cauſes and conſiderations*" without money, is not good; tho' it be recited the bargainee was bound by recognizance for the bargainor.

UPON a ſpecial verdict the caſe was, That one by indenture, reciting, "That whereas *J. S.* was bound in a recognizance "and other bonds for him; now he, for *divers good conſiderations*, "bargained and ſold the lands to him and his heirs." The deed is inrolled within the ſix months (*a*), but it was found there was not any money paid: and, Whether this was a good BARGAIN AND SALE, or not? was the queſtion upon demurrer.

ANDERSON. Every owner of land may part with it as he pleaſeth, if it be according to law: and here it is not ſhewn that the bargain and ſale was becauſe the vendee was bound for him;

3. Ro. Ab. 783. 1. Leon. 170. 1. Co. 176. a. Vent. 137. 7. Co. 40. Cro. Jac. 127. Strange, 1128. Wilſ. 91. 1. Wood's Con. 656. Gilb. Uſes, 29, 51. 84. 112. 253. 1. Vern. 137.

and

and if he were, yet it cannot be a good bargain and sale. But if there had been apt words, he might thereby have raised an use by way of covenant, but clearly not a bargain and sale. WARD *against* LAMBERT

WALMSLEY *accord.* In every bargain and sale there ought to be a *quid pro quo.* But the vendor here hath nothing for his land, and therefore it is void, but it might have risen by way of covenant; but there ought to have been apt words, *viz.* a covenant to stand seised to uses: for if I give land, or bargain or sell land to my son, no use ariseth thereby.—And to that opinion the OTHER JUSTICES inclined, that it is not good by way of bargain and sale, but that it had been a good consideration to raise an use by way of covenant. Wherefore it was adjudged accordingly.

(*a*) See 27. Hen. 8. c. 16.

Anonymous.

CASE 7.

ACTION upon the case was brought for these words: "Thou "art forsworn, and I will make thee flower the pillory, or else "it shall cost me a hundred pounds."—*Et per* TOTAM CURIAM, an action lies not; for ANDERSON said, there is a great difference betwixt the words "forsworn" and "perjured." For "forsworn" is, where he swears against the truth in ordinary discourse; but *perjurium est quando jus alterius pervertitur*, which is to be intended in a judicial proceeding. And this difference hath been allowed of: *quod* CURIA *concessit.* But to say, "he was forsworn in such a "court," or betwixt such parties, an action lies. Wherefore it was adjudged for the defendant.

The difference between the words *forsworn* and *perjured.* Ante, 135. Cro. Car. 288.

Jackson *against* Neal.

CASE 8.

Trinity Term, 36. *Eliz. Roll* 2987.

EJECTIONE FIRMÆ. It was found by special verdict, That the *Lord Hunsdon* was seised of the manor of *Paris-Garden* in the county of *Surrey*, wherein are divers copyholds, and made a lease of two of the copyholds and of the court baron for two thousand years, saving to himself the other demesnes and services. The lessees kept court there, and a copyholder surrenders to the use of *A.* in fee. *A.* obtains licence in court to let it for one and twenty years, from *Michaelmas* last past. He makes a lease afterward for one and twenty years to begin at *Christmas* following to the plaintiff, who entered, and being ousted by the defendant, brings an *ejectione firmæ*: and, Whether this were a good grant by copy, and this lease by the copyholder allowable or not? was the question.—And all THE COURT held, that it was a good copy: for ANDERSON said, this case hath been often in question; for it was the case of *Lord Hatton* for his tenants of *Wellingborough*, and of divers others since that time. And it hath been oftentimes held, that the Court may well continue as to that purpose for admittance of copyholders; for otherwise every one of his own act might destroy his copyholder's estate.

If the lord of a manor grants the inheritance of all the copyholds, the grantee shall hold customary courts, &c. Ante, 39. 103. 4. Co. 26. b. 3. Leon. 208. 2. Com. Dig. 486. Gilb. Ten. 209. 211. 2. T. Rep. 415.

AND SECONDLY, They conceived that the lease is not warranted by this licence, and then no *ejectione firmæ* lies upon this lease.—Afterwards in *Trin.* 37. *Eliz.* judgment was given for the defendant upon this point of the lease.

A copyholder must pursue his licence to lease. Ante, 288. Post. 462.

Owen, 73. Moor, 184. Cro. Jac. 437. 2. Com. Dig. 510. Gilb. Ten. 297. Dougl. 53. 292. 565. 1. T. Rep. 705. 2. Term Rep. 241. 380. 781.

Trinity

Trinity Term,

37. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

CASE 1.

Grenningham *againſt* Ewer.

Hilary Term, 37. Eliz. Roll 806.

To debt on bond conditioned to deliver up three obligations, or to ſeal ſuch a releaſe of them as ſhould be deviſed by the obligee before ſuch a time; it is a good plea in *bar* of the action that the obligee did not deviſe any releaſe before the time mentioned. Poſt. 539. 718.

1. Roll. Abr. 447.
Gould. 142.
Moor, 395.
Poph. 98.
5. Co. 22. a.
1. Mod. 264.
1. Burr. 575.
1. Wood's Con. 301. 783.

DEBT upon an obligation conditioned, That if the defendant delivered unto the plaintiff three obligations, wherein the plaintiff was obliged unto him, or ſealed and delivered to the plaintiff a releaſe of them, as ſhould be deviſed by the plaintiff's counſel, before *Michaelmas*, that then, &c. The defendant pleads, that neither the plaintiff nor his counſel did deviſe any releaſe before *Michaelmas*. Judgment *ſi actio*, &c. And it was thereupon demurred.—GAWDY held it to be a good plea; for there is a rule in law, that the conditions of obligations are always for the benefit of the obligor, and ſhall be expounded liberally for him: then there be two things to be done, *viz.* to deliver the obligations, or to make a releaſe; and a releaſe cannot be made by the act of the obligee, becauſe he did not deviſe it: ſo by his act part of it becoming impoſſible to be performed, the law ſhall diſcharge him of the other part; and it may be he had loſt the obligations, ſo as they might not be delivered; and the intent of both was but only to have them diſcharged, which may be by a releaſe made. Wherefore, &c,—CLENCH. Without doubt he ought to do the one or the other, or at leaſt-wiſe to offer himſelf to the obligee, that he is ready to make the releaſe, ſo as there be not any default in him; for he ought to do the firſt act: for it may be, the obligee would have required him to have made the releaſe, and he could not be found; ſo he by his own act would have avoided the obligation, which is not reaſonable.—FENNER *accord.* Firſt, it is plain if both things reſt in the power of the obligor to perform, he may perform the one or the other at his election; and if before the day of performance, it becomes impoſſible to perform the one thing or the other, by the act of the obligee or of God, that he is diſcharged of the obligation; and ſo it was adjudged 4. *Edw* 6. *in Bendlow's Reports*; although it becomes impoſſible by the act of God. But here the obligor hath not election to do the one or the other; but he hath power of himſelf to do the one thing, *viz.* to deliver the obligations; and of the other, by a contingent act to be done by the obligee at the election of the obligee, if he will adviſe it. But foraſmuch as the obligee hath not adviſed it, the obligor is now bound to deliver the obligation, the non-performance whereof is a forfeiture of the obligation.—POPHAM *accord.* If it were diſjunctive and abſolute to perform

form the one or the other at the election of the defendant, and one part afterwards becomes impoſſible to be performed by the act of the obligee, the obligation ſhall thereby be diſcharged; but it is not here disjunctive at the firſt: but upon a poſſibility afterwards it may come to be disjunctive, *viz.* if the obligee deviſe the releaſe; the which deviſe not being made, the condition is ſingle and abſolute to deliver the obligations. As if *A.* were obliged to infeoff me of certain land, or upon the return of *B.* from *Rome* to pay me twenty pounds, if *B.* never returns, yet he ſhall infeoff me. And it is clear, if the ſecond part of the condition had been, that he ſhould make me ſuch a releaſe as *J. S.* a ſtranger ſhould deviſe, and he did not deviſe any, that the obligor ought to have performed the firſt part of the condition. But here, becauſe the obligee himſelf did not deviſe the releaſe, the queſtion is, Whether he ſhall have advantage of the obligation? And I conceive it to be all one with the caſe of 4. *Hen.* 7. If one be obliged to infeoff me of ſuch land, or to marry *A. S.* before ſuch a day, and a ſtranger marries *A. S.* before the day, yet he ought to make the feoffment: but if the obligee married with *A. S.* before the day, the obligation is diſcharged. The reaſon there is, becauſe there is an abſolute disjunctive condition at the firſt; and when the obligee himſelf diſpenſeth with the one, the obligation is diſcharged. But here it is but a ſimple condition, without the act ſubſequent of the obligee; which act not being done, the obligation remains always on the one part to be performed; which not being performed, it is forfeited. Wherefore, &c. (*a*).

GRENNINGHAM *againſt* EWER.

(*a*) It was moved again, and adjudged for the defendant, poſt. 539.

Collet and Marſh.

CASE 2.

Ante, Page 371. *Caſe* 14.

IT was now moved again.—And GAWDY held it to be erroneous, and that it might well be aſſigned for error; for againſt any thing done or returned by the ſheriff as an officer there may be an averment. As, 6. & 7. *Eliz. Dyer*, 234. a biſhop certified, that he offered the oath to an eccleſiaſtical perſon, according to the 1. *Eliz.* c. 5.; an averment may well lie againſt it, that he did not offer it. So if a biſhop certifies a refuſal of the payment of tithes, yet an averment lies againſt it; and the 31. *Eliz.* c. 3. is, that "the ſummons ſhall be made at the church-door, *and* re-"turned." So it is in the copulative, that the proclamation of the ſummons ſhall be made and returned; and it is not ſufficient to be returned, for then the ſtatute is of little purpoſe.

In a *præcipe quod reddat* if the ſheriff returns that the defendant was *ſummoned*, when in fact he was not, yet a *grand cape* muſt iſſue; for it cannot be aſſigned for error in the judgment by default. Ante, 80. 371.

But all THE OTHER JUSTICES *è contra*. For at the common law, if the ſheriff returned the party ſummoned where he was not, and thereupon a *grand cape* was awarded, there was not any remedy, but a writ of deceit, and not error; for the Juſtices ought to credit the officers; and it is not any error in them to award a *grand cape*. So here, foraſmuch as it is of record before them, that the party was ſummoned according to the ſtatute, they are bound to award a *grand cape*, and no error in them. This ſtatute doth not intend to give other remedy than was at the common law for the tenant: and it is not reaſon, that this awarding of a *grand cape*, upon this ſummons returned, and default recorded, ſhould be ſaid to be erroneous in the Court. Wherefore the judgment was affirmed.—But POPHAM and FENNER conceived in this caſe,

1. Roll. Ab. 621.

Collet and Marsh. case, that the party might have a writ of deceit, if the proclamation of ſummons were not made according to the ſtatute; for now he is not ſummoned according to law. But Clench and Gawdy *è contra*, becauſe it is a good ſummons by the ſummoners upon the land.—Wherefore, &c.

Case 3.

Day *againſt* Auſtin.

Hilary Term, 37. Eliz. Roll 295.

In debt for rent upon a *leaſe* the defendant may deny its *validity*.

Owen, 70. Savil. 132. Comp. 588.

DEBT for rent upon a leaſe for years. The defendant pleaded, that before the leaſe a judgment was given in debt againſt the plaintiff, at the ſuit of *J. S.* and afterward he made this leaſe; and afterwards this land was extended and delivered in execution by *elegit*; before which extent, there was "*nothing in arrear.*" It was thereupon demurred.—And without argument adjudged to be a good plea.

Case 4.

Stroud *againſt* Marſhall.

Infanity cannot be pleaded in bar to debt on bond.

Poſt. 622.

F. N. Br. 202. d. 3. Bl. Com. 291. 4. Bac. Ab. 527.

DEBT upon an obligation. The defendant pleads, that at the time of the obligation made, he was *de non ſane memory*. And it was thereupon demurred.—And adjudged to be no plea; for he cannot ſave himſelf by ſuch a plea, and the opinion of *Fitz-Herbert* held to be no law. Wherefore it was adjudged for the plaintiff.

649. 3. Bac. Ab. 87. See Mr. Hargrave's note [2] Co. Lit. 247. a. 2. Term Rep. 390.

Case 5.

Eaton and Monox *againſt* Laughter.

Trinity Term, 36. Eliz. Roll 407.

If a condition be in the diſjunctive, giving a liberty to do one thing or another at the election of the party, and the one part becomes impoſſible, the condition is void.

Moor, 357. Poph. 98. Co. 5. 21. 2. 1. Lutwyche, 688. Poſt. 864. 2. Mod. 200. 203. Co. Lit. 145. 225. 206. a. Pop. 98. 1. Roll. Ab. 450. Jones, 171. 181. 3. Mod. 232. 1. Salk. 170. 2. Peere Will. (617). 3. Peere Will. 189. Lit Sect. 352.

DEBT upon an obligation of 400l. conditioned, "That if one "*Rainsford* aliened his wife's land, if then during her life "he purchaſed other lands of as good title and annual value to "his wife and her heirs; or do, or ſhall leave her by his laſt will "ſo much in value, by making her his executrix, or in a legacy; "that then, &c." The defendant pleads, that the *feme* was dead, and that *Rainsford* is yet alive. The plaintiff by replication for breach, ſhews the time of the death of the *feme*; and that the ſaid *Rainsford* neither in her life nor ſince her death had purchaſed land of ſuch a value. And it was thereupon demurred.

Atkinson and Coke argued, *for the defendant*, that the obligation was not broken; for it is in the diſjunctive, that he ſhall leave ſo much to his wife by his will, *or* purchaſe lands, &c. and the firſt is become impoſſible to do by the act of God; therefore he is diſcharged of both. And in proof thereof they relied upon 15. *Hen.* 7. *pl.* 2. 2. *Edw.* 4. *pl.* 2. 16. *Hen.* 6. "*Action upon the* "*Caſe*," 44. & 9. *Eliz.* 262. The other part is alſo impoſſible to perform according to the condition, *viz.* to purchaſe lands to the wife and her heirs, the wife being dead; and the purchaſe need not to be made to the heir, for the heir is not named, but to take by way of limitation, and not otherwiſe; as in *Bret and Rigden's Caſe*. And if it ought to be made to the heir, yet the obligation is not forfeited; for *Rainsford* is yet alive, and hath time during his life to perform it.—Hutton and Tanfield *è contra*. Al-

Sed vide Moor, 645. 1. Ld. Raym. 279. Sayer, 243. 2. Wood's Con. 312.

though

though the defendant hath a disjunctive condition, he ought to perform the one or the other at his peril, and so is 21. *Edw.* 3. *pl.* 29. And although the husband had time during all his life to perform it, yet it ought to be done during his wife's life; for otherwise the obligation is forfeited. As to infeoff, to reinfeoff the feoffor, he at his peril ought to do it during the life of the feoffor; for that the time being incertain, he ought to perform it. But if there had been a certain time to do the one thing or the other, and it is become impossible by a subsequent act, that the one of them should be performed before the day, he is discharged of both.—And HUTTON cited *Glen's Case, Mich.* 35. & 36. *Eliz. Rot.* 1227. to be adjudged in the common pleas; where *A.* promised to *B.* that if *C.* did not appear at *Westminster* such a day, that he would pay unto him twenty pounds; and pleads that *C.* died before the day: and ruled to be no plea; for he ought yet to have paid the twenty pounds. So 18. *Eliz. in J. Rhodes' Rep. Barber's Case, in C. B.* that where one was obliged that *A.* should appear the first day of the ensuing Term in the star-chamber, or otherwise he would pay twenty pounds, *A.* dies before the day, so as by the act of God he could not appear; yet it was ruled that the twenty pounds should be paid, or otherwise the obligation should be forfeited. And *Mich.* 34. & 35. *Eliz. in C. B.* this case was betwixt *Trop and Bedingfield. A.* was obliged in one hundred pounds upon condition, that he should stand to the award of *J. S.* if he made any before the feast of *M.* or otherwise at the said feast of *M.* to be at such a place, so as he might be arrested at the suit of the obligee, or else to pay twenty pounds at the said feast of *M.* No arbitrament was made before *M. A.* died, and the twenty pounds was not paid at *M.* It was adjudged that the obligation was forfeited.—POPHAM. It cannot be so as you put the case; but if it were that he should appear, or that he should appear there, or otherwise that he should pay twenty pounds, and he died before the day, yet the twenty pounds ought to be paid; for there is not any disjunctive condition, that he should do one of the two things at any time before. But until *Michaelmas* he is obliged only to appear; and if he appears not, then comes the second condition to have his essence, *viz.* to pay the twenty pounds; so it is not to be paid but upon the non-performance of the other.—And afterwards in the principal case, all THE JUSTICES resolved, that the obligation was not forfeited; for by the express words of the condition, it is limited to *Rainsford* to perform it at any time during his life; and the impossibility thereof cometh by the act of God, which shall not turn the obligor to any prejudice: so as now, being prevented of part of the time, he is discharged from performing it. But when the law appoints a man time to do a thing during his life, he ought at his peril to see it is performed, otherwise the obligation is forfeited. And when a man hath election to do one thing or another before a certain time, and by the act of God it is become impossible that he should perform the one, the law shall privilege him for the other, that he shall not forfeit any obligation by the non-performance thereof.—And so FENNER said it was adjudged in 4. *Edw.* 6. *in Bendlow's Reports.*—And they all (except GAWDY) held, that the obligation was for ever discharged. But GAWDY conceived, that the obligation was not yet forfeited,

Co. Lit. 219. b.

Ant. 277.

Post. 564.

1. Bac. Ab. 433.

Ant. 396.

Eaton and Monox *againſt* Laughter. Lit. Sect. 352.

forfeited, but that he ought, during his life, to purchaſe lands to the heir of his wife, otherwiſe the obligation ſhould be forfeited; but THE OTHER JUSTICES were againſt him in that point. Wherefore it was adjudged for the defendant. 5. *Co.* 21. b. 22.

Case 6.

Welcome *againſt* Gryll.

Michaelmas Term, 36. & 37. *Eliz. Roll* 354.

A variance in the chriſtian name between the writ and the judgment is error.

Moor, 366. Gold. 124. Cro. Car. 463.

ERROR upon a judgment in the common pleas. The error aſſigned was, That a writ of debt was brought by THOMAS WELCOME; and the judgment entered, *quòd prædictus* JOHANNES WELCOME *recuperet*, &c. where it ſhould have been THOMAS. And it was prayed that it might be amended; for it was but a miſ-priſion and miſ-entry of the clerk.—*Sed non allocatur.* But the judgment was reverſed.

Vent. 217. Hob. 327. Ray. 39. Comb. 64. Cowp. 425.

Case 7.

Meggs *againſt* Griffith.

Slanderous words reported as *hearſay* are actionable.

Moor, 408. Gould. 138. Poſt. 645.

ACTION for theſe words: "One told me, that he heard ſay, "that *Miſtreſs Meggs* had poiſoned her huſband;" *ubi revera nullus dixit*, &c. Upon not guilty pleaded, it was found for the plaintiff; and now alledged in arreſt of judgment, that an action lies not for theſe words; for it is but *a report* of *a hear-ſay*, which cannot be any diſcredit.—But notwithſtanding it was adjudged for the plaintiff; for it is a great defamation, and is a cauſe of drawing her name and life in examination. Wherefore, &c.

Case 8.

Howel *againſt* Williams.

Eaſter Term, 36. *Eliz. Roll* 333.

Writ of entry at *common law* will not lie while the tenant by the courteſy is alive, but after plea he ſhall be intended to be dead.

F. N. Br. 207.

ERROR upon a judgment in a writ of entry *ad communem legem.* The error was aſſigned, in that it was not ſhewn in the count, that the tenant by the courteſy (who aliened) was dead; for otherwiſe this writ lies not; but the writ of entry *in conſimili caſu.—Sed non allocatur.* For although this action lies not in the life of tenant by the courteſy; ſo that if he be alive, the plaintiff hath not any cauſe of action; yet it ſhall be ſo intended, eſpecially when the tenant hath pleaded thereto, and admitted it; and if he were alive, the tenant ought to have alledged it. Wherefore the judgment was affirmed.

Case 9.

Sir Humphrey Ferrers and Others *againſt* Wignal.

Hilary Term, 37. *Eliz. Roll* 848.

In a juſtification to treſpaſs under a grant of a feoffment of a manor, the attornment ſhall be intended; for it is collateral to the title.

TRESPASS, as executor of *Edward Holt*, for the taking of an ox. The defendant juſtifies as ſervant to *John Ardern*, for that *Sir John St. Leger* was ſeiſed of the manor of *Bardeſley*, within which manor is ſuch a cuſtom, that every tenant of a meſſuage

within

within the manor dying ſeiſed thereof ſhould pay an *heriot*, *viz.* his beſt beaſt; and that the lord might ſeize it; and that one *John Holt* was tenant of a meſſuage within the manor; and that *Sir John Saint Leger* infeoffed of that manor one *Corbert* and *Lewſon* to the uſe of the ſaid *John Ardern*; and that afterwards the ſaid *John Holt* died ſeiſed of that meſſuage, which deſcended *cuidam Edvardo Holt*; and that he died ſeiſed being poſſeſſed of that ox: thereupon he as ſervant to the ſaid *John Ardern*, and by his command took it as an *heriot*, *&c.* And it was thereupon demurred.—Firſt, For that he entitles *John Ardern* to the manor as a purchaſor, *viz.* by feoffment; and ſheweth not the attornment (*a*) of *John Holt*, the tenant, whoſe ſervices are demanded; for otherwiſe he cannot entitle him to the ſervices of that tenant: and although a man may plead the feoffment of a manor, and that by force thereof he was ſeiſed of that manor, without ſhewing the attornment of the tenants (for it is neceſſarily to be intended as livery without pleading it); yet when he will entitle himſelf to the ſervices of any particular tenant, he ought expreſſly to ſhew his attornment.—*Sed non allocatur*; for THE COURT ſaid, there was not any difference in the pleading of the one caſe more than of the other, but that the attornment may be well intended: and if he did not attorn, the other ought to have pleaded it. And they all here agreed, that by the feoffment of the manor the ſervices paſſed not without an expreſs attornment: but that may well be intended in the pleading, if the contrary be not ſhewn.

SIR HUMPHREY FERRERS and OTHERS *againſt* WIGNAL.

2. Bl. Com. 330.

8. Co. 82. b. Yelv. 135. Co. Lit. 310. Cro. Jac. 102. Bull. N. P. 249.

ANOTHER EXCEPTION was taken, for that he pleads this meſſuage to deſcend *cuidam Edvardo Holt*, and doth not ſay *præd. cto Edvardo Holt teſtatori*; ſo it ſhall be intended to a ſtrange perſon; and then the plea is not good.—*Sed non allocatur*; for he juſtifies the taking after the death of *Edward Holt* the teſtator; and to him it ſhall be intended to be referred, and not to any other. Wherefore without any great argument it was adjudged for the defendant.

An omiſſion of the word "*aforeſaid*," ſupplied by intendment.

(*a*) Attornment is now rendered unneceſſary by 4. & 5. Ann. c. 16. and 11. Geo. 2. c. 19.

Yelverton *againſt* Yelverton.

CASE 10.

Hilary Term, 35. *Eliz.* *Roll* 272.

UPON demurrer the caſe was, The father covenanted by indenture, in conſideration of natural affection, to ſtand ſeiſed of all his lands which he had, and which he afterward ſhould purchaſe, to the uſe of himſelf for life, and after to his youngeſt ſon and his heirs; afterwards he purchaſed land and died: and, Whether the eldeſt or youngeſt ſon ſhould have it? was the queſtion.—BACON argued for the youngeſt ſon, that he ſhould have it; for this covenant ſhews his intent expreſſly, and is to work *in futuro*; and therefore good enough: as if a man deviſeth lands which he hath not, and after purchaſeth them: ſo if one covenants that he will purchaſe lands before *Michaelmas*, and that before *Eaſter* following he will levy a fine of thoſe lands which ſhall be to ſuch uſes, and he levies a fine, and doth not limit any uſes, it ſhall be according to the covenant before the purchaſe (*quod fuit conceſſum* PER CURIAM); for they ſhall be as uſes declared upon that fine whereof he ſhewed his intent before.—But in the principal caſe all THE COURT held, that this covenant veſts nothing in the younger ſon, and is not ſufficient to veſt any uſe in him of this

A covenant to ſtand ſeiſed to a uſe of lands which the covenantor ſhould afterwards purchaſe is void.

Poſt. 423. 493. 2. Ro. Ab. 790. Moor, 342. N. y. 19. Winch. 60. Fitz. 237. 1. Salk. 237. 2. Wilſ. 75. Gilb. on Uſes, 116. Powel on Dev. 191. 2. Bl. Com. 350. 3. Burr. 1490.

Cowp. 94. Dougl. 716. 1. Term Rep. 435. 2. Term Rep. 508. 3. Term Rep. 91.

YELVERTON *against* YELVERTON.

land; for a man cannot by a covenant raise an use out of land which he hath not: for no more than a man may charge, let, or grant a thing which he hath not, no more may he limit an use out of land which he hath not. Also upon every feoffment or purchase, the feoffor or donor from whom the land passeth is to limit the uses to the feoffee or purchasor; then before the purchase one cannot limit how the use shall be, *viz.* that it shall be to his youngest son, where the feoffor hath limited it to the use of him and his heirs; which should be to limit an use out of an use, which the law will not suffer: therefore judgment was given accordingly for the eldest son. And here a case was cited in 20. *Eliz.* (but neither the name nor in what court was mentioned) that a mortgagor intreated a stranger to redeem the land at the day; and covenanted by indenture, that after such redemption the stranger should have the land to him and his heirs; and that he in consideration of such a sum would stand seised to the use of him and his heirs; the stranger redeems the land at the day, the mortgagor enters, the deed is enrolled within the six months: yet ruled that nothing passed; because he had not any estate or interest therein at that time to contract for it.

CASE 11.

Beswick *against* Cunden.

Hilary Term, 35. *Eliz.* *Roll* 493.

If a dam be made in a river, so as to occasion an overflow of water upon the adjoining land, the *tort* is not extinguished by the sale of the land; and the purchasor may maintain an action on the case for the continuing nusance; for every continuance is a fresh nusance. Ante, 191. 251. Post. 520.

ACTION upon the case. For that the defendant levied a dam in such a river such a day, whereby it surrounded the land of *J. S.* who afterwards infeoffed the plaintiff thereof; and that the defendant *adhuc malitiosè custodivit* the said dam, whereby the plaintiff's land is surrounded. Upon this declaration it was demurred in law.

PELHAM. The action is not maintainable, in regard the plaintiff had not any thing in the land at the time of the nusance erected; and there is not any new thing done to his injury; and in proof thereof cited 4. *Assise*, 3. 2. *Hen.* 4. *pl.* 11. 18. *Edw.* 2. *Assise*, 374. But the case in 14. & 15. *Eliz.* *Dyer*, 319. is good law; for there the *Lady Brown* made a new nusance by every turning of the cock, for which she was punishable, although she made it not at the first; but here the land was surrounded by the levying of the dam, and continued surrounded; so the first nusance continues till this present; and therefore the feoffee shall not have his action.

Moor, 353. 1. Ro. Rep. 221. F. N. B. 124. 5. Co. 73. 101. Co. Lit. 56. 2. Leon. 129. 9. Co. 55. Dyer, 319. Yelv. 144. Noy, 112. Ld. Raym. 277. 2. Salk. 459.

FOSTER, *è contra*. The action is not brought for the levying of the dam, but for the continuing thereof from such a day to such, which was after the plaintiff's purchase; and *Fitz. N. Br.* 11. that the heir of the feoffee shall have it against the feoffee of him who levied it. And in *Pasch.* 25. *Eliz.* it was adjudged in this court, in *Rolf's Case*, where one erected an house so near to another's that the rain descended from the new house, &c. and the heir brought an action upon the case for the nusance made by building the house in his father's time, and recovered by judgment.

GAWDY, *Justice*. The action is well brought for continuing of the first nusance, but not for the levying thereof; and therefore the action is well brought for the keeping it up in his time, and not for the levying thereof.

POPHAM. There will be a difference when there is not any profit remaining unto him to whom the nusance is levied. Then it is clear that none shall have the action but he to whom it was done;

done; as if I have pot-water running from my river to my home, and *T. S.* ſtops it in his land before it comes to my land, and I die, or make a feoffment over, my heir or feoffee have not any remedy for this *tort* made before their time. But where any profit remains which comes to the heir or feoffee after the nuſance done; there for ſo much of the profit as is come unto them, and is taken from them by the continuing of the nuſance, they ſhall have their action: then here by the levying of the dam the inheritance of him to whom it was levyed is not taken away; but although his land be ſurrounded, ſome profit remained unto him, which he hath conveyed to the feoffee; which being taken from him by the continuance of the nuſance, it is reaſon that the feoffee ſhould have his action. And therefore if one levies a bank in a river, whereby part of my land is ſurrounded, and afterwards I make a feoffment of my land to *J. S.* and afterwards another part is ſurrounded by reaſon of that bank, he ſhall have an aſſiſe of nuſance *(quod fuit conceſſum)*: ſo here, for that the land of the feoffee grew *à malo ad pejus de die in diem*, by reaſon of the inundation made by this dam, it is reaſon the feoffee ſhould have his action. The ſame law is for a *non feaſance*, *viz.* for not repairing of a bank, where, &c.

Brewick *againſt* Cundem.

Clench and Fenner, *è contra*. Becauſe the *tort* before made is extinguiſhed by the feoffment; and there is not any thing done ſince the feoffment which the feoffee could puniſh. Wherefore, &c.—But afterwards in *Mich.* 37. & 38. *Eliz.* being moved again, all the Juſtices agreed, that the action was well brought. Wherefore it was adjudged accordingly for the plaintiff (*a*).

(*a*) Vide poſt. 520. where it appears that judgment was given for the defendant, upon a new objection.

Brook *againſt* Watſon.

Case 12.

Words not actionable. Moor, 409.

Action upon the caſe. And declares, Whereas he was an alderman and a merchant in *York*, and had always kept a true debt-book, that the defendant ſpake of him theſe words; "He is a falſe knave, and keepeth a *falſe* debt book; for he "chargeth me with the receipt of a piece of velvet, which is falſe." After not guilty pleaded, and found for the plaintiff, it was moved in arreſt of judgment, that an action lay not for thoſe words.

Hubert, *for the plaintiff*, moved, that the action was maintainable, becauſe they touch him in his trade of living; for in a merchant fidelity in his trade is requiſite; for he many times buys and ſells his wares upon truſt.

But all the Juſtices held, that the action lay not. For the firſt words, "He is a falſe knave," it is clear that an action lieth not. And for the ſecond part, that "he keepeth a falſe debt-book," it is not actionable, for it is not any diſcredit unto him; for it may be his ſervant keepeth it, or that ſomewhat might by overſight be miſ-entered therein. And it is not of neceſſity that every merchant ſhould have a debt-book; and by that diſcredit there is not any diſcredit to his trade: as to ſay of a counſellor, that "he "miſ-enters the name of his client in his book, *viz.* the "plaintiff for the defendant," is not any cauſe of action; but to ſay, that a counſellor gives ill counſel, or that a merchant is a bankrupt, an action lies; becauſe it toucheth them in their profeſſion. Popham alſo ſaid, that the action was not maintainable, becauſe the defendant ſpake only of a grie-

Brook *against* Watson.

vance unto himself by that false entry, and not in general words to discredit him; for if he had said to others, "Take heed how "you deal with him, for he keepeth a false book," then peradventure an action would lie, because he drew other customers from him. Therefore it was adjudged for the defendant.

Case 13.

Stringer *against* Stanlack.

Hilary Term, 37. *Eliz. Roll* 325.

Trespass for a wrongful taking and detention in prison. Plea a justification by legal process. Replication that he detained him after a *supersedeas* to the writ. This is a *departure* from the declaration; for it only complains of the *tortious imprisonment*, and omits the *wrongful taking*. Ante, 9.

Lut. 588. 1402. Cro. Jac. 180. 2. Mod. 57. Fort. 344. 1. Mod. 194. 3. Mod. 225. 366. 10. Mod. 205. 307. 351. 11. Mod. 230. 385. 541. Ld. Raym. 399. 4. Ba. Ab. 463, 464. *in notis.*

FALSE IMPRISONMENT. For that he took and imprisoned him for the space of an hour. The defendant pleaded, that a *capias ad satisfaciendum* at the suit of *J. S.* issued to the sheriff of *Wilts* against the plaintiff, who made his warrant to the defendant to arrest the plaintiff; whereupon he by virtue thereof arrested the plaintiff. *Et hoc, &c.* The plaintiff replies, that after the writ of execution awarded, and before the caption and imprisonment, he satisfied the sheriff of the monies, &c.; whereupon the sheriff made his warrant, directed to all his bailiffs, &c. that they should surcease the execution; and that he delivered it to the plaintiff; and that the defendant arrested him; and presently after the arrest he shewed unto him this discharge; and yet notwithstanding he detained him in prison for the space of an hour. The defendant rejoins, that he was illiterate; and presently after the delivery of the warrant of *supersedeas* from the sheriff, he went to a literate man to know the effect thereof, and in the *interim* detained him in prison; and as soon as he was informed of the contents thereof he set him at large. It was thereupon demurred; for it was said, that he taking upon him the office to be a bailiff, ought not to be ignorant thereof, or what he is to do; and that pretence of ignorance shall not excuse him, but at his peril he is to take notice of this discharge, &c.

Fenner. When he is once taken by force of a *ca. sa.* the sheriff himself could not have discharged the prisoner without offence to the law, although he had received the monies; for the writ is, *capias ad satisfaciendum, ita quod habeas corpus ejus, &c.* So although he pays the money, yet the sheriff ought not to discharge him; and if he do, he is chargeable with an escape: wherefore his warrant is no warrant to the bailiff, after he was once arrested, to discharge him; and the defendant did well, and no *tort* in detaining of him. And of that opinion was Popham, *Chief Justice*.

But Gawdy and Clench held, that in regard it was but a writ of execution, and to have the money in court, he having received the money, ought not to have arrested the party; and if he hath arrested him, might well discharge him. *Vide* 33. *Hen.* 6. *pl.* 48. *per Danbie.* 13. *Hen.* 7. *pl.* 16. 21. *Hen.* 7. *pl.* 23. But as to the point of the bailiff's ignorance they delivered not any opinion. But Fenner held, that he well might take time to be informed thereof, and he is not compellable to take notice of it. But Popham doubted thereof.

Gawdy then moved an exception to the replication; for it is, that after this warrant of *supersedeas* from the sheriff delivered unto him, he detained him in prison; and so complains of the tortious imprisonment, but speaks nothing of his caption, whereof he complained in his declaration; so there is a manifest departure as to it, for it maintains not his count. And so, for this cause only, it was adjudged for the defendant.

Peter Carye's Caſe.

Case 14.

Drawing a ſword in Weſtminſter-hall is indictable, tho' out of the view of the Courts.

PETER CARYE was indicted for drawing his ſword *in aulâ Weſtmon. ſedentibus Curiis*; and in diſturbing the ſheriff in making an arreſt upon one *T.* by force of a bill of *Middleſex*; and being arraigned and found guilty, had judgment of perpetual impriſonment, and to pay a hundred pounds to the queen.

AND NOTE, Upon the evidence it appeared to be upon the ſtairs aſcending the court of wards, and ſo out of the view of the Courts.—But POPHAM ſaid, although it were out of the view of the Courts, yet if the indictment had been as it ought to have been (and as we have precedents thereof in *Edw.* 4.) *viz. coram domina reginâ*, the judgment ſhould have been, that his right hand ſhould have been cut off, and that he ſhould forfeit all his lands and chattels, and have perpetual impriſonment.

3. Inſt. 140. Owen, 120. 1. Hawk 88. 2. Hawk. 632.

Gray *againſt* Fletcher.

Case 15.

Hilary Term, 37. *Eliz. Roll* 601.

If the jury find that the plaintiff has common *prout* he preſcribed, and alſo a uſage to pay a hen yearly *pro eâdem communâ*, yet the verdict is good, for they are two preſcriptions.

REPLEVIN. The defendant juſtifies for *damage feaſant*. The plaintiff claims common in the place WHERE, &c. Iſſue thereupon; and the jury found the preſcription; but further found, that he and all thoſe whoſe eſtates, &c. had uſed to pay for the ſaid common every year a hen and five eggs: and if, &c. they prayed the diſcretion of the Court. It was thereupon moved, that it was found againſt the plaintiff, for it is not found as he alledged; for he alledgeth it as abſolute, and it is found conditionally, *viz.* if he paid for it.

POPHAM. I was of counſel with a *Devonſhire Caſe*, where a man preſcribeth to have pot-water out of a river; and iſſue thereupon; and found that he uſed to have it, paying ſixpence by the year; and adjudged that it was found againſt him who preſcribed. But that is not like to this caſe; for there was a condition executory every year with the preſcription, and therefore it ought to be intirely alledged. But here it is a thing collateral from the preſcription, and the preſcription is perfect without alledging it; wherefore it is well enough found for the plaintiff.

GAWDY ſaid, that if the hen and eggs were not paid, in this caſe he might diſtrain the plaintiff's beaſts going upon the common, although it were upon his own land; *quod* POPHAM *conceſſit*. Wherefore it was adjudged for the plaintiff. 26. *Hen.* 8. *pl.* 5.

Poſt. 415. 445. 546. 563. S.C. 5. Co. 78. b. Co. Ent. 573. C.o. Car. 533. 1. Saund. 320. Carter, 88. 9. Co. 78. 1. Roll. Rep. 121. Hob. 42. Lucas, 223. Bull. N. P. 59. 1. Wilſ. 253. 1. Burr. 442. Cowp. 47. Dougl. 666.

Wilcocks *againſt* Watſon.

Case 16.

Hilary Term, 37. *Eliz. Roll* 1011.

A huſband who after the death of his wife executrix, has goods, which ſhe being ſole made a gift of by covin, ſhall be charged as executor *de ſon tort*. Vide 43. Eliz. c. 8.

DEBT upon an obligation againſt him as executor of *A.* The defendant pleads *plenè adminiſtravit*; and iſſue thereupon. The jury find a ſpecial verdict, that *A.* made *E.* his executrix, and died poſſeſſed of divers goods, which *E.* made a fraudulent gift of all her goods to *J. S. &c.* and continued in the poſſeſſion of them,

2. Term Rep. 97. 587. 597. Mo. 396. 2. Leon 223. 5. Co. 54.

WILCOCKS *againſt* WATSON.

2. Brown's Cafes in Chan. 323. Poſt. 565.

them, and took the defendant to huſband and died; that the defendant is poſſeſſed of part of thoſe goods of the value of, &c. and paid legacies; and if thoſe goods ſhould be found to be aſſets in his hands, they found for the plaintiff; and if, &c. for the defendant.—FENNER held, that they ſhould not be aſſets; for although being but fraudulent, it ſhall be ſaid to be a void gift againſt the donor and creditor, and ſo liable to his debt: yet it is good betwixt the donor and donee; and ſhall not be ſaid to be aſſets in the hands of any but the donor or donee; but here the huſband is a mere ſtranger thereto. Wherefore, &c.—But all THE OTHER JUSTICES *è contra*; for they by the common law (the gift being fraudulent) are liable to the plaintiff's execution. And POPHAM ſaid, if the gift were good againſt all but creditors (as it is), then they belong to the donee, and in his hands are liable to this debt; and if the gift be void, they remain to the executors of the *feme*; and then the *baron* having taken them and paid legacies, is chargeable by reaſon thereof, as executor *de ſon tort demeſne*. And ſo thoſe goods *quâcunque viâ datâ*, are liable to this debt in whoſeſoever hands they come, unleſs by title paramount, or by ſale *bonâ fide*. Wherefore it was adjudged for the plaintiff.

3. Cr. 89.

CASE 17.

Wheeler *againſt* Collier.

Hilary Term, 37. Eliz. Roll .

If an adminiſtratrix promiſe to pay a debt of the inteſtate's in conſideration that the creditor ſends her in more goods, an *aſſumpſit* will lie for both debts, and judgment *de bonis propriis* may be given.

Moor, 419. 2. Cr. 110. Noy, 19. Vent. 268. 2. Lev. 110. 228. 3. Lev. 74. 2. Keb. 814. Show. 366. Salk. 10. Carth. 236. Hob. 68. 184. 4. Burr. 2155. Ante, 91. 102.

ASSUMPSIT. And declares, that the *baron* of the defendant was indebted to the plaintiff in fifty pounds for beer, and died inteſtate, and adminiſtration, &c. was committed to the defendant; and that afterwards the defendant, in conſideration that the plaintiff would deliver unto her ſix barrels of beer, aſſumed to pay to the plaintiff, as well the fifty pounds due by the inteſtate, as for the ſix barrels delivered unto herſelf; and that he thereupon had delivered to the defendant ſix barrels of beer, &c.—And after *non aſſumpſit* pleaded, and found for the plaintiff, and entire damages aſſeſſed, as well for the one debt as for the other, it was moved in arreſt of judgment, that the plaintiff ſhould not recover; becauſe for the inteſtate's debts the judgment ſhould be againſt the defendant, *de bonis teſtatoris*; and for the beer delivered unto herſelf, *de bonis propriis*; and therefore the plaintiff ought not to have joined them in one action, or at leaſtwiſe, that damages ought to have been ſevered by the verdict.

POPHAM. It is clear that one cannot join in one action an *aſſumpſit* of the teſtator, and an *aſſumpſit* of the defendant for his own debt; but here the defendant aſſumed for the debt of the inteſtate and her own debt; and if ſeveral judgments be to be given, it is clear that there ought to be ſeveral actions brought for them. And I conceive that ſeveral judgments ſhall be given, *viz.* for the inteſtate's debt, if he hath, &c. *Et ſi non, de bonis propriis*; for, if judgment ſhould be given *de propriis bonis* generally, then ſhe, notwithſtanding ſhe had no more goods of the inteſtate's than to ſatisfy that debt, ſhould be bound to pay legacies; and that payment ſhould not excuſe her, which is not reaſonable.

But all THE OTHER JUSTICES *è contra*; becauſe this action is brought againſt her of her own *aſſumpſit*: the judgment ſhall be general in both caſes *de bonis propriis*, for it is a charge by her own act;

act; yet if it had been *de bonis teſtatoris*, ſhe ſhould have paid it to them, and it ſhould have been allowed unto her. And here by her *aſſumpſit* as adminiſtratrix, it is become her own proper debt, as if ſhe had entered into an obligation. Wherefore, &c.—Afterwards, *Mich.* 37. & 38. it was adjudged for the plaintiff.

WHEELER *againſt* COLLIER.

Bateman *againſt* Spring.

CASE 18.

Hilary Term, 37. *Eliz. Roll* 363.

ASSUMPSIT in *London*. The defendant pleads a concord in *Suffolk* of all matters, treſpaſſes, &c. but in *London*, ABSQUE HOC that he aſſumed in *London*. The plaintiff maintains his declaration, and traverſes the concord; and it was thereupon demurred.—And after argument, it was adjudged to be a good traverſe; for otherwiſe by a falſe plea a man ſhould make all actions tranſitory to be local, which is againſt law: and of that opinion was THE WHOLE COURT. Wherefore it was adjudged for the plaintiff.

In tranſitory actions, if the defendant traverſes the place, the plaintiff may take a *traverſe upon the traverſe*. Ant. 99. Co. Lit. 282. b. 1. Strange, 115. Ld. Raym. 126.

Trinity Term,

37. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*
Sir Francis Beaumond, *Knt.*
Thomas Walmſley, *Eſq.* } *Juſtices.*
Thomas Owen, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

Chriſtopher Baker *againſt* Searle.

CASE 1.

Hilary Term, 37. *Eliz. Roll* 1144.

EJECTIONE FIRMÆ. Upon not guilty pleaded, a ſpecial verdict was found, that *Edward earl of Bedford* was ſeiſed in tail of the rectory of *D. et decimis inde*, &c. (which are the tithes in queſtion) and let it to *John Willet* and his aſſigns, for the lives of *Chriſtopher Baker*, *Joan Baker* his *feme*, and *Chriſtopher Willet*; and that the ſaid *John Willet* demiſed the ſaid rectory and tithes to one *Danbury* and his heirs, to the uſe of *Chriſtopher Baker* the plaintiff for eighty-nine years, if any of the *ceſty que vies* ſhould ſo long live; *virtutis cujus diſmiſſionis idem querens fuit poſſeſſionatus*, until the defendant entered, &c.

A verdict in ejectment finding a leaſe by tenant in tail, muſt alſo find the commencement of the eſtate, and the life of the tenant. Ante, 118. Poſt. 440. Co. Lit. 44 f. 2. Cro. Jac. 152.

2. Roll. Ab. 445, 446. 5. Com. Dig. 51. 79. Cowp. 826. Poſt. 442. Ant. 131. 1. Ent. 373.

BAKER *againſt* SEARLE.

And it was hereupon moved for the defendant,—FIRST, That the verdict was not good for the plaintiff, becauſe he doth not ſhew the beginning of the eſtate tail, which is the particular eſtate: and that THE COURT held to be an apparent fault. Alſo he doth not aver the life of the tenant in tail; ſo the leaſe of the tithes, which conſiſts in grants, was determined by his death. As alſo, for that the uſe is not limited to *B.* but for years only, ſo the remainder of the uſe is in *Danbury*, and the life of *Danbury* is not averred: and if he be dead, *Chriſtopher Baker* the plaintiff is in as an *occupant*, and then no *ejectione firmæ* lies in the caſe. But THE COURT held clearly, that there is not any uſe limited but for the years, becauſe the reſidue of the eſtate is in *Willet* the grantor, and not in *Danbury*. And it is all one as to this purpoſe, with a feoffment to the uſe of one for life; the uſe for the reſidue of the eſtate is in the feoffor; and clearly, there cannot be any *occupancy*, becauſe it is granted to *Danbury* and his heirs, which excludes the *occupancy*.

ANOTHER EXCEPTION was taken by WALMSLEY, for that he ſaith, *virtute cujus diſmiſſionis*, where he comes in by the limitation of an uſe; ſo it ought to have been, *et virtute ſtatuti, &c.* And this was held to be an apparent fault in ſubſtance and not in form.—Wherefore it was adjudged for the defendant.

CASE 2.

Mathewſon *againſt* Lydiate.

Where ſeveral enter into ſeveral covenants in the ſame deed, a releaſe to one of the covenantors will not diſcharge the others. Poſt. 470. 546. 2. Roll. Ab. 30. 5. Co. 22, 23. 2. Salk. 574. Bull. N. P. 268. 5 Com. Dig. 232.

DEBT was brought upon a charter-party indenture. The caſe was, Indentures were made betwixt the maſter and three others of a ſhip on the one part, and *G. Lydiate* and ſix other merchants on the other part; whereby the owners of the ſhip covenanted with the merchants to ſhip ſuch merchandiſes to ſuch a port beyond ſeas, and to recarry from the ſaid port certain other merchandiſes to ſome port in *London*; whereby every of the merchants covenanted ſeverally to pay for every tun brought to *London*, to any port there, thirty ſhillings; and if they made default in payment, to pay three pounds for every tun; and for twenty tuns brought to a port at *London*, and not paying thirty ſhillings for every tun, he demanded ſixty **pounds**. The defendant pleads, that the ſeal of one of the merchants was *debruſed* from the deed: and it was thereupon demurred.

GLANVILE. This deed is ſeveral for every of them; and although the ſeal of one of them is *debruſed*, it is not material, for it remains good againſt the others; and it is not like to the caſe 3. *Hen.* 7. *pl.* 5. for there the obligation is joint and ſeveral. And this caſe is common in *London*, for they covenanted ſeverally; and when any one of them hath performed his part, the manner is to pull off his ſeal, and then the deed is cancelled againſt him, and remains good againſt the others. And this very point was adjudged before DANIEL, *ſerjeant*, in *London*; and afterwards debt was brought thereupon in this court, and the plaintiff recovered (which DANIEL being preſent affirmed, and that he adjudged it upon conference with ſome of the Juſtices).

But

But in the principal case the record was viewed, and it appears that he alledged, that he brought the merchandise to *Ratcliffe* within the county of *Middlesex*, and so he hath not shewn that it was brought to a port in *London*; and although *Ratcliffe* is one of the ports of *London*, yet it is not so averred. Wherefore, without regard to the matter in law, it was adjudged for the defendant. (*a*).

MATHEWSON *against* LYDIATE.

(*a*) This case was revived upon a new action, and adjudged for the plaintiff, post. 470. 546.

Snelling *against* Norton.

CASE 3.

DEBT against him as administrator to one *Norton* upon an obligation. The defendant shews the custom of *London* to be, that if a contract be made by a citizen to pay money to another citizen, and he who made the contract dies, that his executors or administrators shall be chargeable therewith, as if it were upon an obligation: and shews further, how the intestate was indebted upon a contract to one *A.* who had recovered against him; and that he had *riens ouster en ses maynes*, &c. And it was thereupon demurred.

By the custom of London, DEBT lies against executors and administrators for a simple contract of their testator or intestate;—and a plaintiff cannot be nonsuited after the Court have given their opinion on the point of law. 5. Co. 82. b. Post. 843.

GLANVILE moved, that this custom was not good. For first, It is against law, that an executor or administrator should be charged upon a simple contract. Secondly, It is against law, that a stranger should be barred of his debt upon specialty, by reason of a debt upon a simple contract. Wherefore, &c.

DANIEL *è contra*. The custom was always to bind the executors or administrators to pay debts upon contracts; and customs in *London* are confirmed by parliament, and are now as strong as a statute: and therefore in *London* they prescribe to give land in *mortmain*, which is against statute law; and there is not any custom but that it deprives, and is against the common law in some point. And this custom is reasonable; for a debt upon a contract is as well due as a debt upon an obligation; and therefore there is as great reason for the payment of the one as of the other, although the law hath given a greater prerogative, *viz.* a priority of paying the one rather than to the other: and although it might seem hard to have allowed this custom in this court, if it had been originally pleaded here; yet when the custom hath been executed against the administrator by the laws of the city, whereto he is subject, it would be mischievous unto him to be disallowed it here, for then he should be twice charged without remedy; and this difference is taken in 1. *Edw.* 4. 8.

22. *Edw.* 4. pl. 2. Priv. Lond. 146. 149. 1. *Edw.* 4. pl. 6. b. 1. Saund. 67. 8. Co. 126. a. 43. *Edw.* 3. pl. 11. b. 9. Co. 68. Noy, 53. Cro. Car. 196. Moor, 136. 4. Inst. 247. 5. Com. Dig 197. 1. Bac. Abr. 639. 671. 2. Bac. Abr. 435.

OWEN, *Justice*. The custom is reasonable; for the executor in conscience is bound to pay debt upon a contract as well as upon specialty: and such a matter was about four years since in this court, but not adjudged.—And of that opinion were THE OTHER JUSTICES, especially as this case is, being executed against him, who is liable and chargeable by the customs of *London*.

And afterwards, in *Mich.* 37. & 38. *Eliz.* it was moved again, and another exception taken, for that the custom cannot be to bind the administrator, because he begins to be chargeable by the statute of 31. *Edw.* 3. c. 11. and no action lay against him at the common law,

But

SNELLING *against* NORTON.

But it was denied PER TOTAM CURIAM; for an adminiſtrator was chargeable, and to be ſued at the common law, but he might not ſue: and the ſtatute was but in affirmance of the common law (*a*); and they were ſued as executors at the common law: and ſo it is 19. *Edw.* 3. "*Covenant*," 24. And the caſe of 8. *Eliz.* 274. that an action lies not againſt them at the common law, is not law in this point. The plaintiff would then have been nonſuited; *ſed non potuit* (foraſmuch as two of the Juſtices had delivered their opinion), no more than after a verdict. Wherefore it was adjudged for the defendant.

5. Co. 82. b. Cro. Jac. 35. Poſt. 658.

(*a*) 5. Co. 82. b. 2. Inſt. 397. 3. Co. 39. b.

Michaelmas

37. & 38. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

Vicary *againſt* Farthing.

CASE 1.

TRESPASS. The parties were at iſſue; and at the trial by *niſi prius* in the county of *Devon*, to prove the nonage of the plaintiff at the time of the leaſe made (which he would avoid), a church book was given in evidence; and after the jury's departure from the bar, and before they had agreed upon their verdict, the plaintiff's ſolicitor delivered to the jurors the ſaid church book: and afterwards they found for the plaintiff. And all this matter being examined before WALMSLEY, Juſtice of aſſiſe there, he returned this verdict and all this matter upon the *poſtea*.

Parish-books and regiſters are good evidence to prove births and marriages; and when produced, the jury may have them out of court while they are conferring on their verdict. Ante, 189. Poſt. 616.

And now for this cauſe it was moved by SERJEANT HEALE, that judgment ſhould be ſtayed; and in proof thereof cited 11. *Hen.* 4. 18. 35. *Hen.* 6. "*Examination*," 17. 14. *Hen.* 7. 2. and alſo one *Medcalf's Caſe*, which was in the common pleas, *anno* 34. *Eliz.* where a witneſs examined gave evidence to a jury; and afterwards one of the jury, when they were conferring upon their verdict, called him to recite his evidence again, which he did, and affirmed upon his oath upon his examination, that he did not ſpeak more or leſs than before; and yet this matter being returned upon the *poſtea*, it was reſolved, that no judgment ſhould be given upon that verdict: and *Hugh Wiatt* ſaid, that in this queen's time it was ruled in one *Pickering's Caſe*, that where letters patents were given in evidence to the jury, and afterwards when they were conferring upon their verdict, the plaintiff, without the Court's direction, delivered unto them the ſaid letters patents, which were given in evidence, that judgment was for this cauſe ſtayed upon the verdict.

1. Roll. Ab. 715. Moor, 451. 7. Mod. 129. Co. Lit. 227. 411. 2. Hale, 307. 2. Roll. Ab. 687. Bull. N. P. 308. 5. Mod. 395. Ld. Ray. 337. 744. 6. Mod. 81. Salk. 645. 5. Com. Dig. 174. Cowp. 17. 593. Dougl. 171. 1. Term Rep. 466.

GAWDY and POPHAM denied that caſe. But GAWDY ſaid, that as this caſe is, the Juſtice of aſſiſe might have refuſed this verdict; and it is alſo clear, that *writings* or books which are not under ſeal, cannot be delivered to the jurors without the aſſent of both parties; but being delivered by the Court without the aſſent of the parties, neither of the parties can avoid the verdict, in regard they were given in evidence before; and the Court had given direction to the jury concerning their validity, eſpecially being evidences in writing, which cannot be altered, nor by intendment cannot induce the jury further to their verdict, than the ſhewing of them in court had done before; but *Medcalf's Caſe* might well

be,

VICARY *againſt* FARTHING.

be, becauſe it being but evidence by parol, the witneſs might peradventure alter his teſtimony before given by a greater enforcement, or otherwiſe, than he ſaid before (although upon his examination he would not confeſs ſo much), which peradventure was the cauſe to move the jury to give their verdict; wherefore it ſhall be a good cauſe to ſtay the judgment.—And of that opinion were POPHAM and CLENCH: for otherwiſe it would be very miſchievous to the party for whom this verdict paſſed, if the delivery of evidence by the contrary party, or peradventure by a ſtranger, without his privity, ſhould ſtay his judgment; which is the reaſon that eating and drinking by a juror (unleſs it be at the coſts of the party for whom the verdict paſs) ſhall not avoid the verdict.—

Co. Lit. 227. b. 1. Freem. 79. 2. Jones, 83.

But FENNER *è contra*; becauſe there might be ſome matter in this book to induce them otherwiſe than they intended before; and becauſe it was delivered on his part for whom the verdict paſſed. Wherefore it was adjourned.—But afterwards, in *Trin.* 38. *Eliz.* it was adjudged for the plaintiff.

See 7. Jac. 1. c. 12.

CASE 2.

Courtier *againſt* Barret and Sampſon.

Hilary Term, 36. *Eliz.* *Roll* 496.

In *replevin*, if the plaintiff is nonſuited, and the jury find damages, it is no verdict, but only an inqueſt of office. Ante, 339.

ERROR upon a judgment in the common pleas in a replevin. The defendant avows for *damage feaſant*. The parties were at iſſue. The plaintiff was nonſuited after evidence; and the jury aſſeſſed damages for the avowant. The plaintiff brings error, and aſſigns for error a *diſcontinuance*, for that the plaintiff declared in *Michaelmas Term*, and that the defendant imparled until *Hilary Term*, and from *Hilary Term* till *Eaſter Term*, and there is not any continuance: and then the plaintiff declared again (as the manner there is), and the defendant pleads thereto, and iſſue there joined. —It was moved, that this was not now to be aſſigned for error, becauſe it is after verdict, and ſo aided by the ſtatute of jeofails.—But it was ruled by the WHOLE COURT, that it was not aided; for here the plaintiff being nonſuited, there is not any verdict given: but in that whereof the jury are to enquire of damages, their verdict is but an office of inqueſt, and no verdict whereof, &c. And it was cited to be here adjudged ſo betwixt *Buſly* and *Ireland* (*a*).

1. Bac. Abr. 91. 1. Com. Dig. 333. 5. Com. Dig. 157.

(*a*) Ante, 339.

If the plaintiff declares in one Term, and after imparlance to another declares *de novo*, a continuance muſt be entered. Ante, 339. Poſt. 416.

SECONDLY, It was moved, that here was not any diſcontinuance; for the ſecond declaration is a new declaration of itſelf, and doth not refer to the firſt: and there ought not to be any continuance of the firſt; for it is not an *alias prout patet*, &c. ſo it cannot be intended to refer to a former.—But it was thereto anſwered, that it is not the manner to make ſuch entries in the common pleas; yet it may be well intended to refer to the former proceedings: wherefore they ſent for two of the prothonotaries of the common pleas, who came and informed the Court, that their courſe was not to make an *alias prout patet*, but to make all their declarations *de novo*, and yet they referred to the firſt record. Wherefore for this diſcontinuance the judgment was reverſed.

5. Com. Dig. 177.

Hoo

Hoe *againſt* Taylor.

CASE 3.

Eaſter Term, 37. Eliz. Roll 369.

ERROR upon a judgment in the common pleas in treſpaſs, for cutting down underwood. The defendant juſtifies by reaſon of a leaſe of the land made unto him by *J. S.* for years. The plaintiff ſhews, that the ſaid *J. S.* was ſeiſed of the manor of *Milford*, whereof that place, &c.; and that the underwood growing in that place, where, &c. had time, whereof, &c. been demiſed by copy; and that the ſaid *J. S.* before the leaſe to the defendant, granted unto him and his heirs by copy, &c. the underwood there from time to time growing, to be cut down by the plaintiff and his heirs, *quolibet anno*, four or five acres *annuatim*, *&c.* whereupon he was thereof ſeiſed, *ſecundum conſuetudinem*, *&c.* until the defendant entered and made the treſpaſs.

Underwood is a thing of inheritance and perpetuity, and may be granted in fee by copy of court roll; and will ſupport treſpaſs *quare clauſum fregit*. Poſt. 814. 1. Roll. Ab. 649. 4 Co. 30. Co. Lit. 48. b. 58. Co. Cop. 112. Moor, 355. Strange, 1238. Burr. 1824.

The defendant demurred in law; and after argument it was there adjudged for the plaintiff.—And it was now aſſigned for error, Firſt, That underwood growing cannot be demiſed by copy; for here the ſoil itſelf is not let, but only the underwood annually growing: which was agreed by THE COURT, that the land itſelf here was not demiſed by the copy.—Secondly, That notwithſtanding this grant to the leſſee, that the leſſor might well cut down the underwood; for it is but in nature of the grant of *eſtovers*, where the grantor may take trees with the grantee.

But THE COURT reſolved for the plaintiff, that the action was maintainable; for this underwood is a thing of inheritance and perpetuity; for after every cutting down, they will grow again from the ſtubs; and ſo may be well demiſed in fee by copy: and as *eſtovers* might be granted in fee, ſo might this alſo.—FENNER ſaid, that he knew a market within the manor of *Crookhorn*, in the county of *Somerſet*, to be demiſed by copy; and it was ſaid here that *Sir John Bourn's Caſe* was adjudged, that a grant of tithes by copy was good.—They alſo held, that the grantor here could not meddle with the woods, nor his leſſee; for he hath entirely granted the underwood, and not *eſtovers*, or ſo many loads of wood. Wherefore the judgment was affirmed. *Vide* 4. *Co.* 30. b.

Sir Chriſtopher Blunt's Caſe.

CASE 4.

IN an information upon an intruſion by the queen againſt *Sir Chriſtopher Blunt*, a juror was challenged for non-ſufficiency of freehold; and by the examination of the juror it appeared, that he had freehold of the value only of fifteen ſhillings *per annum*.—Yet it was ruled by THE COURT, that he had ſufficient to paſs on that jury; for at the common law, if a juror had any freehold it was ſufficient. But by the 1. *Hen.* 5. c. 3. he ought to have forty ſhillings *per annum*; and by the 27. *Eliz.* c. 6. he ought to have four pounds *per annum*, where the damages exceeded forty marks *per annum*. But the ſtatutes ſpeak only between party and party, which extends not to the queen; wherefore the juror was ſworn. But it was ruled, that he ought to have ſome freehold; and therefore one who had not any freehold was there challenged and withdrawn.

Grand jury muſt be freeholders; but to what amount is uncertain. Co Lit. 272. a. 2. Roll. Ab 647. Cro. Jac. 672. 2. Hale, 155. 4. Bl. Com. 302. 3. Bac. Abr. 255. 2. Hawkins, 308. 583.

See alſo 4. & 5. Will. & Mary, c. 24. 7. & 8. Will. 3. c. 32. and 3. Geo. 2. c. 25. ſ. 19. 4. Geo. 2. c. 25. ſ. 20.

Hardy

BERAITON *against* HAY.

HAM, said, it is a common case, that if there be a prescription to have common for all his beasts, and it is found that he ought to have common for all his beasts *levant & couchant*, it was found against him who pleaded it. FENNER was of opinion to give judgment presently for the plaintiff; but it was then moved that here was not any verdict found upon this issue; for they concluded their verdict, *si, &c.* they found the defendant guilty; if otherwise, not guilty, &c. and so there is not any conclusion of the point in issue. And of that opinion were ALL THE JUSTICES upon view of the record, and that for this cause it was insufficient and a gross fault; whereupon a *venire facias de novo* was awarded.

CASE 9.

Warner *against* Winch.

Easter Term, 37. Eliz. Roll 53.

In C. B. if the plaintiff declare twice on the same original, and one declaration varies from the other, it is error. Ante, 412. Post. 507. Cro. Jac. 537.

ERROR of a judgment in debt in the common pleas. The error assigned was, That the plaintiff declares for a debt upon an action of twenty pounds; and after imparlance declares *de novo*, and therein demanded a debt of eighteen pounds; and had judgment to recover.—And it was held to be erroneous, for that there were but one original and two declarations, and the one varying from the other: and therefore it was adjudged here *Mich.* 36. and 37. *Eliz.* where in debt upon an obligation dated 1. *Maii*, the second declaration was upon an obligation dated 2. *Maii*, and thereupon judgment, that it should be reversed. Whereupon the judgment here was afterwards reversed.

See 4. and 5. Ann. c. 16.

CASE 10.

Goodwin *against* Grudge.

If judgment in debt is affirmed on a writ of error, the plaintiff shall have execution without *scire facias*. — Rep. 104. *contra.*

ERROR upon a judgment in debt, where the judgment was affirmed.—It was held by ALL THE JUSTICES, and so the clerks said was their usage, that the defendant in the writ of error shall have execution presently without a *scire facias*, although the year and day be passed since the first judgment *Vide* 15. *Hen.* 7. 5. Post. 706. 5. Co. 88. 2. Inst. 471. 6 Mod. 288. Salk. 322. Strange, 301. 1. Roll. Sed vide 2. Burr. 660. 3. Bac. Abr. 362. 4. Bac. Abr. 412. 2. Ld. Raym. 807.

CASE 11.

Badcock *against* Atkins.

In words spoken of another by a character or description which is equally relative to several, the declaration must aver, that the plaintiff was the person spoken of.

1. Roll. Abr. 84, 85. Cro. Car. 177. 443. 1. Roll. Rep. 79.

ACTION for these words: "Thy father," *innuendo* the plaintiff, "hath stolen six sheep." The defendant justifies, and issue taken thereupon, and found for the plaintiff. It was alledged in arrest of judgment, that the declaration was not certain, nor sufficient to shew that he spake those words *of* the plaintiff. For it is not averred that he spake them *to* the plaintiff's son, nor that the plaintiff's son was there present; and then it cannot be intended *of* the plaintiff; and the *innuendo* will not help this uncertainty. And although the defendant hath admitted it by his plea, yet that shall never help a declaration which is defective in substance: but if it were defective in form only, as by leaving out the place where a thing was done, or by pleading a collateral plea, that may be made good, as 18. *Edw.* 4. 16. and 6. *Edw.* 4. 2.—And of that opinion were ALL THE JUSTICES (except GAWDY), that the declaration was not good; for it cannot be intended to be spoken *of* the

the plaintiff more than of any other perſon, unleſs it had been averred, that his ſon was there preſent: and although the defendant by his plea confeſſeth, that he intended them of the plaintiff, yet that ſhall not help the declaration, which is inſufficient. But GAWDY *à contra*: becauſe it ſhall be intended, that the plaintiff's ſon was there, for otherwiſe he could not have ſaid, "thy father." But notwithſtanding it was adjudged for the defendant.

BADCOCK *againſt* ATKINS.

Sale, Leſſee of Nevel, *(who claimed to be* LORD LATIMER*)* *againſt* Barrington.

CASE 12.

EJECTIONE FIRMÆ. The defendant pleaded not guilty; and after iſſue joined, the queen ſent a ſpecial writ to the Court, reciting how the defendant was tenant in tail, with divers remainders over, the reverſion to the queen, and that her reverſion might be prejudiced by this trial: wherefore it was commanded them not to proceed to the trial of this iſſue *reginâ inconſultâ*. It was thereupon much diſputed, whether this writ were allowable or not; becauſe it is a perſonal action only, wherein it appears not how the queen can be prejudiced; for it may be the plaintiff claims his leaſe under the queen's title. It was alſo objected, that in regard the defendant is tenant in tail, with divers remainders over, the reverſion to the queen, it is a very remote cauſe to have aid. By the ſtatute alſo of 2. *Edw.* 3. c. 8. and 11. *Rich.* 2. c. 10. juſtice ought not to be hindered by the king's writ, either under the great or petit ſeal; and therefore this writ ſhall not be any cauſe of delaying this ſuit.—But COKE the *Queen's Attorney* ſaid, that this was not to delay juſtice or hinder right, but to do right; for it is neither law nor juſtice, that the queen ſhould be prejudiced in her inheritance without being made privy, which ought to be by *aid-prayer*. And when the defendant will not pray in aid, this writ is in nature thereof to inform the Court how it concerns the queen, and to inhibit the proceedings until, &c. For if the Court be informed by pleading that it concerns the queen in her inheritance, they *ex officio* ought ſtay it until the queen be conſulted, &c. and when they do not, ſhe may by law inforce them by her writ; and that ſuch a writ hath been awarded, appears by *Fitz. N. Br.* 154. 21. *Edw.* 3 44. & 31. *Edw.* 3. "*Saver Default*," 27. But theſe are in real actions; yet it may alſo, be in perſonal actions, where the queen's title appears to come in queſtion; and ſo is 2. *Rich.* 3. *pl.* 13. And although he be tenant in tail, remainder over, who is impleaded, yet it is all one; for tenant in tail ſhall have aid of the queen, but not of a common perſon, as appears by 10. *Hen.* 7. *pl.* 20. & 38. *Edw.* 3. *pl.* 14. And that this is allowable in a perſonal action after iſſue, as well as aid-prayer ſhall be allowed, ſtands upon one reaſon, and is one law; and ſo it hath been put in ure. And *Mich* 34. & 35. *Eliz.* in the common pleas, in an *ejectione firmæ* by one *Bloſield* for lands, parcel of the poſſeſſions of *the earl of Arundel*, after iſſue ſuch a writ was awarded as is here, and by advice of all the Juſtices was allowed.—And it was held by ALL THE JUSTICES here, that this writ ought to be obeyed; foraſmuch as it appears unto them, (although this

In ejectment, a ſpecial writ may be directed to the Court, ſignifying title in the crown to the lands demanded; and inhibiting the trial until the defendant has made his *aid-prayer*, and procured the writ *de procedendo ad judicium*. Poſt. 694.

Moor, 421. 843. 1. Roll. Abr. 159. 167. 27. *Hen.* 8. pl. 9. 28. *Hen.* 6. pl. 4. Dyer, 101. 257. See the notes to the 8th edit. of the Nat. Brev. p. 359, 360. Hard. 179. 1. Com. Dig. 292.

SALE *against* BARRINGTON.

trial is but in a perſonal action) that the queen may be prejudiced in her title. And by the writ, there is a recital of a title in the queen; and that this trial is prejudicial thereto, which is not reaſon to be tried *reginá inconſultâ*. And her trial of right is to be diſcuſſed in chancery, where the queen's records are to prove her title. Wherefore it is not reaſon we ſhould proceed without a *procedendo*. And ſo they all held. Whereupon they ſaid, it were fitting, that the plaintiff ſhould procure a *procedendo*. Wherefore &c.

CASE 13.

Paramour *againſt* Varrold.

Michaelmas Term, 35. & 36. *Eliz. Roll* 26.

To falſe impriſonment in *London*, if the defendant pleads a recovery and execution in *Sandwich*, and TRAVERSES the place, the plaintiff may TRAVERSE the record of the recovery.

Ante, 92.

Moor, 340. 428. Poph. 101. Co. Lit. 282. b. Saund. 22. Hob. 104. Lutw. 1438. 1630. Carth. 99. Cro. Car. 105. Ld. Ray. 370.

FALSE IMPRISONMENT in *London*. The defendant pleaded a recovery againſt the plaintiff in debt, in *Sandwich* court in *Kent*: by cuſtom, and by force of a *capias ad ſatisfaciendum* awarded there, he took and impriſoned him at *Sandwich*, ABSQUE HOC that he is guilty in *London*. The plaintiff for replication ſaith, that he impriſoned him in *London*, *prout*, &c. ABSQUE HOC *quòd habetur aliquod tale recordum, et hoc paratus eſt verificare per recordum illud*, &c. And thereupon the defendant demurred in law.

Firſt, Becauſe he takes a traverſe upon a traverſe, where he ought to have maintained his declaration; as 1. *Hen.* 7. 21.

Secondly, Becauſe he avers, *quòd non habetur aliquod tale recordum, et hoc paratus eſt verificare per recordum illud*, which is a mere contrariety; for he therein confeſſeth, that there is ſuch a record, which is the expreſs caſe in 9. *Hen.* 7. where it is alledged, and held to be error.

And all THE COURT for the firſt held clearly, that the plea is good; for otherwiſe, every defendant by a falſe plea might draw a tranſitory action in what place he would, and might make the place and day alledged material; which the law will not ſuffer, but will rather ſuffer the plaintiff to traverſe ſuch a falſe plea without maintaining his action. And ſo are the YEAR BOOKS of 10. *Edw.* 4. *pl.* 2. 12. *Edw.* 4. *pl.* 6. 43. *Edw.* 3. *pl.* 23.

Quære, If a repugnant averment ſhall vitiate a plea, where the plea does not require an averment?

For the ſecond point, GAWDY and FENNER held the replication to be ill; for it is merely contrary and repugnant to ſay, that there is no ſuch record, and that he would aver it by the ſame record, and that this is matter of ſubſtance which needs not be expreſſed upon demurrer; for no plea is good without an averment, but it is a meer nugation; and the Court ſhall not have any regard thereto, if the party will not aver it: and a void averment is as no averment; and ſo this plea is ill.

POPHAM and CLENCH *è contra* in this point. For although the averment be void and contrariant in this caſe, yet the plea is here good without an averment; for it is a plea in the negative, and needs no other averment but to ſay, *Et hoc petit quòd inquiratur*, &c. And then the other ſhall ſay, *Habetur tale recordum, et hoc paratus eſt verificare per recordum.* And then the defendant ſhall join with him, *Et prædictus defendens ſimiliter*, &c.

But

But then PELHAM, *for the defendant*, ſhewed, that this action is by original writ, wherein the treſpaſs is ſuppoſed 1. *May*, 34. *Eliz.* and in the declaration the treſpaſs is ſuppoſed to be 20. *May*, 34. *Eliz.* ſo the writ ſuppoſeth the treſpaſs to be done before it was in truth done; as appears by the declaration.

PARAMOUR *againſt* YARKOLD.

In treſpaſs by *original* a variance between the day in the writ and the day in the declaration is fatal.

And for this cauſe it was held by THE WHOLE COURT to be ill; and adjudged accordingly.

Cro. Jac. 664. Cowp. 178. Dougl. 135.

Marvin *againſt* Maynard.

CASE 14.

ACTION upon the caſe. Whereas he was ſeiſed of the manor of *Upton-Gray*, that the defendant, to ſlander his title, ſpake theſe words: "*Mr. Marvin*," *innuendo* the plaintiff, "hath "not any title to *Upton*," *innuendo Upton-Gray*.

In ſlander of title, the plaintiff need not ſhew what eſtate he had; and it is ſufficient if the words ſpoken allude to the eſtate, by its uſual appellation.

Upon not guilty pleaded, it was found for the plaintiff, and now moved in arreſt of judgment,

FIRST, Becauſe he doth not ſhew what eſtate he had therein: for it may be that he hath it but *pur auter vie*, and then *ceſtuy qui vie* being dead, he hath not any title; he ought alſo to recover his damages according to his eſtate, &c.

Ante, 197. 346. Poſt. 427. 2. Com. Dig. 174.

SECONDLY, The words are not ſpoken of *Upton Gray*, but of *Upton* only; which cannot be intended of *Upton-Gray*, and it cannot be helped by the *innuendo*.

But all THE COURT reſolved, that the declaration was well enough; for as to the firſt, he needed not ſhew what eſtate, &c. for his ſeiſin of any eſtate is ſufficient. And therefore FENNER ſaid, in the caſe of *Huddleſton v. Lord Dacres* in a writ of annuity, the defendant pleaded, that he granted it unto him to be his ſteward; and that he was ſeiſed of the manor of *D.* and requeſted him to keep his court there, and he refuſed, &c. and exception was there taken, becauſe he ſhews not of what eſtate he was ſeiſed: and ruled to be well enough; for peradventure it might be perilous to diſcover his eſtate.

TO THE SECOND they held, that the *innuendo* did ſufficiently ſerve to ſhew his intent, what he meant in naming *Upton*; for it is uſually known without the addition, and might be called ſo. Wherefore the *innuendo* ſtands well with his ſpeaking. But if without the *innuendo* it could not by any intendment be taken ſo, it might have been otherwiſe.

Wherefore it was adjudged for the plaintiff.

CASE 15.

Sharplus *againſt* Hankinſon.

Hilary Term, 37. Eliz. Roll

A bond conditioned to pay 20l. of "*lawful* "*Engliſh money* "*which ſhall be* "*in the year* "1599, *in and* "*upon* 13. *Oct.* "*next enſuing* "THE DATE "*hereof*," ſhall be conſtrued to mean on 13. October in the year 1600. Ante, 388.

2. Bl. Com. 381. 3. Vernon, 30.

DEBT upon an obligation conditioned, "That if the obligor "payed to the obligee twenty pounds of lawful *Engliſh* money, "which ſhall be in the year of our Lord 1599, in and upon the "13. *Oct.* next inſuing the date hereof; that then, &c." The defendant pleaded, that the day of payment was not yet come. It was thereupon demurred; and moved for the plaintiff, that the condition ſhall be conſtrued, that the payment ſhall be upon the 13. *Oct.* next enſuing the date of the bond, which day is paſt; and the words, "which ſhall be in the year, &c." ſhall have relation that it ſhall be ſuch money as ſhall be current *anno* 1599. —But FULLER, *for the defendant*, moved, that the words ſhall be conſtrued, that the payment ſhall be upon the "13. *Oct.* which "ſhall be in *anno* 1599 next enſuing:" ſo by this expoſition and interplacing of the words, all parts may ſtand together; and ſo without doubt was the intent of the parties.

GAWDY. The condition is ſenſeleſs. But he conceived, when a certain time of payment is expreſſed, that ought to ſtand; and all the reſidue ſhall be void, being repugnant. And there cannot be ſuch a conſtruction made, that "the next enſuing" ſhall refer to "*anno* 1599;" for that is certain enough without thoſe words; but it ſhall refer to the 13. *Octobor*; for otherwiſe the 13. *Octobor* had not any ſenſe: wherefore he conceived the day was paſt.

FENNER, CLENCH, and POPHAM, *è contra*.—FENNER held, that when the words in deeds be repugnant, they ſhall be rejected; and we ought to adjudge upon the other words: then here, when the payment is appointed to be in *anno* 1599, there is certainty enough; and the words, "the 13. *Oct.* next enſuing the date," are repugnant and void; and therefore the day of payment is not yet come.—POPHAM. The payment ſhall be upon the 13. *Oct.* *anno* 1599: for it is reaſonable to conſtrue it according to the intent of the parties, and as it may ſtand; and then it ſhall be conſtrued, that the obligor ſhall pay ſuch money as ſhall be current 1599; and that he ſhall pay it upon the 13. *Oct.* next after Cowp. 600. the year 1599; and the words "after the date hereof" are repugnant and void. And by this expoſition, all the words but "the "date hereof" ſtand. And if it ſhould be conſtrued to be paid upon the 13. *Oct.* next enſuing the date, it ſhould be impoſſible: for how may a man pay money in *anno* 1593, which ſhould be current in *anno* 1599, before which time peradventure the coin may be changed; and therefore this conſtruction ſhall be received, whereby the day is not yet come.—CLENCH held, that it ſhould be conſtrued as FULLER had expounded it; ſo as all the words might ſtand by interpoſing and interplacing of them.—Wherefore, becauſe three of them agreed againſt the plaintiff, but upon ſeveral reaſons, GAWDY conſented unto them, that judgment ſhould be given againſt the plaintiff. And without further argument it was adjudged for the defendant.

Penn

Penn *againſt* Glover.

CASE 16.

REPLEVIN. Upon demurrer, the caſe was, That the biſhop of *Rocheſter* made a leaſe for years of a manor wherein were divers copyholders, with a "PROVISO, that the leſſee ſhall not "moleſt, vex, or put out any copyholder, paying his duties and "ſervices, *ſub pœnâ foriſfacturæ.*" The biſhop entered for the condition broken. The breach was aſſigned *in hoc*, that the defendant *vi et armis* entered upon a copyholder in a cow-houſe, parcel of the premiſes, and beat him; *et ſic moleſtavit, &c.* And it was thereupon demurred.—And TANFIELD moved, that this was not any breach of the condition; for the moleſtation is to be intended of ſuch ſort, that he ſhould ouſt him of his copyhold, either by often diſtraining, that he could not enjoy it quietly, or by ſome other vexations, whereby he was inforced to relinquiſh his poſſeſſion. And it is not ſhewn here, that he ouſted him from his copyhold; and if he entered upon his copyhold, and did not ouſt him, it is not any breach, and the wrong here is done only to his perſon, and not to his copyhold tenement.—And of that opinion were ALL THE COURT, that hereby the condition was not broken, for that moleſtation ought to be intended, ſuch as ſhould be an expulſion or moleſtation concerning his copyhold tenement; and there is not any breach by a *tort* done to his perſon, or in diſturbing him in any other lands, unleſs they were his copyhold tenements within the manor. Wherefore, without any further argument, it was adjudged accordingly.

A condition, that the leſſee ſhall not moleſt, vex, &c. any copyholder, is not broken by an entry on the premiſes *vi et armis* to beat him, if he do not *ouſt* him from his copyhold.

Moor, 400. 492. 8. Co. 91. 1. Roll. Ab. 430. 3. Wilſon, 234. 380. 530. 1. Wood's Con. 400. 409. 1. Term Rep. 671.

Welden *againſt* Bridgewater.

CASE 17.

Hilary Term, 34. *Eliz. Roll* 489.

TRESPASS, *quare clauſum fregit* VOCAT' *Bear-Meadow* APUD *Paunchbourn*, and his graſs there growing, &c. Upon not guilty pleaded, it was found by a ſpecial verdict, that the plaintiff was ſeiſed of the manor of *Paunchbourn*, and that in the ſaid manor there was a meadow called *Wide-Meadow*, containing eighty acres; whereof the place WHERE is parcel; and that from time whereof, &c. this meadow hath been divided by lot between divers perſons, *pro captione fœni de herbâ inde proveniente*; and that from time whereof, &c. the plaintiff, and all thoſe whoſe eſtate, &c. have uſed to have had allotted to them yearly out of the ſaid meadow thirteen acres; which being allotted ſhall be called *Bear-Meadow*; and that the place WHERE was allotted to the plaintiff; and that the defendant entered and cut down the graſs. And if, &c.—ATKINSON, *for the plaintiff*. The queſtion was, Whether the plaintiff hath a profit *a prender* in that land only, or the land itſelf; ſo as he might have treſpaſs, *quare clauſum fregit, &c.*? For if he hath but a profit, he cannot maintain this action, as 5. *Hen.* 7. 10. of him who hath a warren only in another man's ſoil; or 15. *Hen.* 7. or 14. *Hen.* 8. of him who is a commoner only. But it ſeemeth here, this land being allotted unto him, he hath an intereſt and freehold therein for the time, and may well have this action; as *Fitz. N. Br.* 62. partition between coparceners, that the one ſhall have the manor of *D.* for one year, and the other the manor of *S.* and that every

Treſpaſs *quare clauſum fregit* lies for the portion of a common field, after the allotment. Ante, 413. 1. Roll. Ab. 829. Co. Lit. 4. a. 48. b. Moor, 302. Dyer, 285. 3. Leon. 213. 1. Wood's Con. 497. Strange, 1288. Wilſ. 107. Burr. 1824. 3. Bl. Com. 210. 5. Co. Dig. 576. 1. Burr. 137. 1. Term Rep. 430.

WELDEN *againſt* BRIDGEWATER

ſecond year they ſhall exchange. Now each of them for their time have a ſeveral freehold, and ſhall have treſpaſs alone, *quare clauſum fregit.* So *temps Ed.* 1. "*Partition*" 21. partition, that the one ſhall have it from ſuch a day to ſuch a day, and the other for the reſidue of the year (*a*). Wherefore, &c.—And of that opinion was THE WHOLE COURT; for it may be good by preſcription; and by the allotment, it is the proper ſoil and freehold of him to whom it is allotted; and that he well might maintain a *quare clauſum fregit.* Wherefore it was adjudged for the plaintiff.

(*a*) Co. Lit. 4. a. 167. a. 180. a. 1. Roll. Ab. 189. F. N. B. 62.

CASE 18.

Sower *againſt* Bradfield.

Trinity Term, 37. *Eliz. Roll*

An unliquidated claim may be ſubmitted, and if of the ſum due it is awarded, *viz.* that *A.* ſhall pay 40s. and *B.* 40s. ſeveral actions may be brought.

DEBT for forty ſhillings upon an arbitrament. Whereas the plaintiff claimed from the defendant and one *J. S.* five pounds expended for them *pro diverſis negotiis*; and they had ſubmitted themſelves to the arbitrament of *Sir William Paſton* for it; who arbitrated, that the defendant and *J S.* ſhould pay to the plaintiff four pounds, *viz.* the one forty ſhillings, and the other forty ſhillings: and for the forty ſhillings to be paid by the defendant, he brought this action. And it was thereupon demurred.—FIRST, Becauſe this is a debt certain, which ought not of itſelf to be put in arbitration. *Sed non allocatur.* For although a debt upon a bill or contract cannot by itſelf be put in arbitrament, yet this five pounds is claimed as expences *prò diverſis negotiis*, and ſo may be well put in arbitration.—SECONDLY, It was alledged, that this action ought to have been joint againſt them both for the four pounds, and not ſeveral. *Sed non allocatur.* For the *viz.* makes it as ſeveral arbitraments for both. Wherefore it was adjudged for the plaintiff.

Hob. 318. 9. Co. 78. Noy's Max. 108. 1. Bac. Ab. 133. 3. P. Will. 187. Dougl. 690. Cowp. 56.

CASE 19.

Adams *againſt* Albon.

Error in the return of the *venire facias.* Ante, 260, 388.

IT was moved in arreſt of judgment after verdict, that the *venire facias* bore *teſte* 9. *July*, 37. *Eliz.* returnable *die Mercurii proximo poſt tres Trinitat' proximo ſequent'*, which day is not yet come; for the 9. *July*, 37. *Eliz.* is *dies Mercurii in tres Trinitat'* 37. *Eliz.* and the laſt day of the Term; and therefore the writ here is not returnable the ſame day, but ought to be *die Mercurii proximo poſt tres Trinitat'*, which is a year after. Wherefore this trial is before the day that the *venire facias* is returnable, and therefore ill; and it is not like where in a trial the *venire facias* is not returned; for that ſhall be intended good, a *venire facias* being awarded and returned, and that it was imbezzled, which is aided by the ſtatute. —And of that opinion was THE WHOLE COURT at this time. *Sed adjournatur.*

CASE 20.

Fuller *againſt* Fuller.

Hilary Term, 36. *Eliz. Roll* 586.

If a deviſe be made of lands in tail with divers remainders over, and the deviſee dies, leaving iſſue, in the life-time of the deviſor, the next in the remainder ſhall have the land, although the deviſor had declared *viva voce* that the iſſue of the deviſee ſhould have it. Ante, 243. Dyer, 304. *in notis.* 1. Lev. 243. 1. Vent. 341. 2. Jones, 135. Ray. 408. Gilb. on Dev. 00. S. C. Moor, 353.

TRESPASS, for lands in *Chigwell*, in the county of *Eſſex.* Upon not guilty pleaded, a ſpecial verdict was found, that one "*Henry Fuller* was ſeiſed of this land in fee, holden in ſocage, and "had iſſue four ſons, *viz. John*, *Richard*, *Edward*, and *Henry*, and

deviſed

FULLER *against* FULLER.

"devised the land to *Richard* the second son, and his heirs of his "body; and after his death without issue, then to *Edward* the third "son in tail, and then to *John* the eldest son in tail, remainder to the "right heirs of the devisor. *Richard* dies, having issue two sons, "*viz. Thomas* and *William*. Afterwards *Henry* the devisor said, "*My will is, that the sons of Richard, my son deceased, shall have the "land devised to their father, as they should have had if their father "had lived, and had died after me.*". *Henry* the devisor died. "*Thomas* the son of *Richard* entered; upon whom *John* the eldest "son of *Henry* entered. *Thomas* re-enters. *John* brings trespass, "*Et si, &c.*"

Carth. 309. 1. Peer. Will. 399. 1. Strange, 25. 4. Mod. 255. 1. Salk. 226. 230. 1. Ld. Ray. 3. 5. Ba. Ab. 512. Mod. Rep. 267. Pow. on Dev. 486. 2. Ba. Ab. 86, 87. Doug. 323. 330. 345 *in notis*. 4. Burr. 1932. 2. T. Rep. 241.

This case was argued by TOWSE, *for the plaintiff*, and by FOSTER, *for the defendant*; and two points therein moved.—First, Whether by reason of this new speech and declaration after the death of *Richard*, *Thomas* his son shall take as a devisee?—Secondly, Admitting it be not a good devise to *Thomas*, Whether *John* the eldest son shall have it during the time that any issue of the body of *Richard* be alive? or, Whether *Edward* in remainder should enter presently? because it is not limited unto him, until the death of *Richard* without issue; so as in the mean time the heir of the devisor might retain it; for if he in remainder ought to have it, then the defendant hath *primer possession*; and so the plaintiff hath not any cause of action.

1. Lut. 735. (*a*) Plowd. 345.

GAWDY held, that *Thomas* should not take it; and that there was not any difference betwixt this and *Brett's Case* *. There the devise was in fee, here it is in tail, which is all one: and this speech of the devisor is not of any effect; for there is such a speech in *Brett's Case*; but the devise of the manor of *D.* which he had not, was good with a new publication after he had purchased it; so of a devise to an infant *in ventre sa mere* with a new publication after its birth (*a*); for there is his will written, "that he "should have it;" and it is expressed by his words afterwards; but here there is not any written will, that the son of *Richard* should have it; and he cannot have it as his heir. Wherefore, &c.

Ante, 401. 3. Ba. Ab. 124. 1. Freem. 244. 293. Fearn, 429. Pow. on Dev. 325. 1. Wilf. 486. 1. Stra. 362. Co. 1. 101. 2. Brown's Caf. Ch. 33. 68. 321.

To the second point there is no doubt, but that he in remainder shall have it presently; for the devise being void to the first, it is as if it never had been made; so it is if the first devisee refuse, he in the remainder shall have it presently; as 37. *Hen.* 6. *Plow.* 414. *secundo Mar. Dyer*, *Jasper Warren's Case*. Wherefore the plaintiff hath not any cause of action, &c.—And in this point all THE OTHER JUSTICES agreed with him; and as to the first point (*b*), CLENCH agreed also.

(*b*) Post. 473.

But FENNER and POPHAM *è contra*. FENNER held, that *Thomas* should take it by this devise; for this differs from *Brett's Case*, in the manner of the new publication; and as a devise to one who is not *in esse*, with a publication afterwards when he comes *in esse*, is good, so it is here; for it appears (as it is found) that the devisor knew well, that the heirs of the body of *Richard* should not take by descent, their father being dead; and therefore he would have them to take as they might, *viz.* as purchasors by the name of heirs of the body of *Richard*, although *Richard* was dead at the time of the devisor's death; and to do that, he made this new declaration of his will.—POPHAM *accord.* that *Thomas* the heir of *Richard* should have it as devisee by this new publication; for none will deny that if the devise had been to *Richard*, and the heirs of his body, and *Richard* had been dead at the time of the devise,

2. Vern. 209. Plowd. 344. 4. Mod. 283. 3. Com. Dig. 78. Co. Lit. 26. b. Mod. Rep. 267. 2. Levinz, 243.

(*a*) See 11, & 12. Will. 3. c. 16.

FULLER *againſt* FULLER.

but that the heir ſhould take it as a purchaſor: and truly there is not any difference; for this new publication is *quaſi* a new will, as it is in *Trevilian's Caſe*, *Dyer*, 142. And I hold clearly, if a man hath iſſue three ſons, and deviſe his land to the eldeſt in tail, remainder to the ſecond in tail, remainder to the third in fee, and the eldeſt dieth, having iſſue in his father's life-time, that his iſſue ſhall have it without a new publication, becauſe the intent of the deviſor was not to diſinherit any of his ſons; and it may be he did not know of the death of his eldeſt ſon, who was peradventure beyond ſea, or elſewhere abſent. And there is not any reaſon to make ſuch a conſtruction, as to diſinherit his iſſue; for by ſuch means many may be diſinherited, and the wills expounded againſt the intent of the deviſor. But of ſuch a deviſe to a ſtranger, it may peradventure be otherwiſe; for the deviſee being dead, the intent of the deviſor doth not appear to carry it from his own heir to the heir of a ſtranger.—But for the ſecond point, in regard they all agreed againſt the plaintiff, it was adjudged preſently for the defendant.

CASE 21.

Charter *againſt* Hunter.

Trinity Term, 37. *Eliz.* *Roll* 1064.

Words not actionable.

ERROR of a judgment in an action upon the caſe for words: "Thou art a prigging, pilfering merchant, and haſt pilfered "away my goods from my wife and children." The error aſſigned was, Becauſe an action lay not for theſe words.—And of that opinion was THE WHOLE COURT; for the words do not impeach him of felony. Wherefore the judgment was reverſed.

CASE 22.

Bartholomew *againſt* Dighton.

Hilary Term, 37. *Eliz.* *Roll* 251.

An infant muſt ſue by his guardian, and not by attorney. Poſt. 541. 1 Ro. Ab. 287. 4. Co. 53. b. Cro. Jac. 441. 5. Com. Dig 198. 2. Saund. 212.

ERROR upon a judgment in the common pleas, Becauſe the plaintiff being an infant ſued by attorney, and recovered, whereas he ought to have ſued by his guardian.—But THE COURT upon the motion held, that in regard the plaintiff hath recovered, and it is for his benefit, and no prejudice by his appearance by attorney, that it ſhould not be aſſigned for error: but they would adviſe.—And afterward, *Paſch.* 39. *Eliz.* being moved, it was held clearly to be error. And the judgment was reverſed for that cauſe.

CASE 23.

Whetſtone *againſt* Higford.

The king's chaplain, tho' appointed by *parol* only, is enabled to hold pluralities. 9. Co. 98, 99. Godb. 41. Hob. 302. Ld. Raym. 162. 1. Salk. 161.

UPON evidence to a jury the queſtion was, Whether one might be the queen's chaplain, and have plurality of benefices by the 21. *Hen.* 8. c. 13. by being retained by *parol* only?—POPHAM held, that the queen could not retain by *parol* only. But FENNER *è contra*; who ſaid, there was a caſe in this court, wherein he himſelf argued, where the ſerjeant of the mace being made by the delivery of the mace unto him, it was held to be good. And his office being in queſtion as being forfeited, he pleaded the queen's licence by *parol* to be abſent, and not to exerciſe it; and it

was

was adjudged to be good; for her corporate body doth not take away or destroy the human body, but that she might retain servants, and do other acts as a common person does. And it was shewn that this chaplain died above thirty years since; and that during his life he was reputed her chaplain, and exercised the place of chaplain as well in her private closet as elsewhere; and had all the benefits as her chaplain, &c.—Wherefore THE COURT said, that it should be intended that he was her chaplain, and well and duly retained: wherefore the question being to avoid a lease made by him to the plaintiff, it was held that he was a person able to make such a lease. And the jury found for the plaintiff.

WHETSTONE *against* HIGFORD.

Germyn *against* Rolls.

CASE 24.

Michaelmas Term, 36. & 37. *Eliz. Roll* 365.

ERROR upon a judgment in the common pleas, where *Germyn* brought debt in the common pleas against *Rolls*, as executor of *Norwood*, for certain fees due unto him as attorney of the common pleas; as also for fees due unto him for soliciting causes in the queen's bench, as also for money expended about a fine for alienation. The defendant pleaded *nunques executor*, &c. and found against him; and judgment for the plaintiff; and *Rolls* brought his writ of error.—And the error assigned was, Because this action of debt lieth not against an executor; for although it lies against him for an attorney's fees, because the testator could not have waged his law for them, in regard he was compellable to expend them; yet forasmuch as it is brought for fees in soliciting suits in the queen's bench, where he was not attorney, for which an action lies not against an executor; then having conjoined them, and damages entirely given, the judgment is therefore erroneous in all (*a*).—And it was agreed by THE WHOLE COURT, that the action lay not for part against the executor, and that the conjoining of them hath made all ill, so as he might have demurred upon it, and have abated the writ: But if by his plea he having admitted it, he hath now made it good? was the question. For it was said, that the reason why this action lies not against an executor is, because the testator might have waged his law; and an executor by intendment cannot have conusance thereof: but when he takes upon him notice thereof, and admitted that there was such a contract, then he may be well charged, as 10. *Hen.* 6. *pl.* 25. 13. *Edw.* 3. *tit.* "*Executor.*" And so 2. *Edw.* 4. account lies not against an executor; yet if he upon account brought against him enters into the account, and be found in arrear, action of debt for this account lies against him.—GAWDY. The judgment is erroneous, for this writ of itself lies not against an executor; and the admittance of the party shall never make a writ, which of itself is ill, to be good; but the Court shall adjudge it according to law. As 10. *Edw.* 4. trespass against the lord *vi et armis*, and he admits it, yet the Court shall abate the writ. So 28. *Hen.* 8. *pl.* 13. debt is brought for a rent service, which hath continuance, although the defendant admits it, the Court shall abate the writ.—FENNER *è contra*. For this is not such an action which lies not against an executor of itself, but it lies not by reason he is not privy to the contract, and he could not have notice thereof.

An action of *debt* will not lie against an executor upon a simple contract with the testator, and the Court shall *ex officio* abate the writ, although the defendant by his pleading has admitted the contract. Vide post. 459. and *quære*.

1. Roll. Abr. 924. 929.
2. Roll. Abr. 107.
Moor, 366.
1. Saund. 286.
Cro. Car. 107. 159. 194.
Cro. Jac. 521.
Cont. 9. Co. 87.
10. Co. 77.
Vaugh. 101.
1. Lev. 200.

(*a*) Noy, 117.
2. Leon. 178.
2. Sid. 57. 94.
2. Roll. Rep. 136.
Carth. 235.

Germyn *against* Rolls.

thereof. But if his ignorance is taken away, and he may have notice thereof, the law will charge him. As 46. *Edw.* 3. debt was brought againſt an executor for a ſervant's wages; and becauſe that he himſelf retained the ſervant for the teſtator, ſo as he thereby had conuſance, it was held that he ſhould be charged; otherwiſe not: ſo here, becauſe by his plea he takes notice thereof, and admits it by an implicit confeſſion, the action well lies. Wherefore, &c.—Popham. I agree that if in debt upon a ſimple contract, the executor confeſs the action, or pleads *nihil debet*, judgment ſhall be given againſt him; becauſe in the one caſe upon the trial the truth of the debt appears; and in the other caſe he by his plea confeſſeth it; but yet in reſpect the teſtator might have waged his law, or pleaded *nihil debet*, and the one way is taken from the executor to diſcharge that debt, he ſhall not be charged and enforced to plead if he will not: but I doubt here whether by this plea the contract be confeſſed. And therefore a caſe hath been cited to be adjudged in the common pleas, 30. *Eliz. Huſon v. Webb*, that in debt againſt an executor upon a ſingle contract, who pleaded *plene adminiſtravit*, and found againſt him, yet no judgment could be againſt him; but the judgment was againſt the plaintiff, which is all one in the reaſon with this caſe: therefore it is good to ſee the record thereof (*a*).

Poſt. 471.

Ante, 181.

(*a*) It was moved again, and the Judges being of the ſame opinion, the judgment was reverſed, poſt. 459.

Case 25.

Shaw *againſt* Tompſon.

The wife of a copyholder intitled to dower may recover the value in damages in the court baron, although they exceed 40*s*.
1. Ro. Ab. 601.
Moor, 559.
Noy, 129.
2 Com. Dig. 309.
Co. Lit. 33.
3. Fac. Ab. 123.
Gilb. Ten. 221.

DEBT for fifty pounds recovered in a court baron. The caſe was, That a *feme* recovered dower of a copyhold according to the cuſtom of the manor by *plaint* in a court baron; and for that her *baron* died ſeiſed, ſhe recovered by judgment there, fifty pounds damages; and for that fifty brought this action; and declares upon all this matter. It was thereupon demurred. And the ſole queſtion (as Tanfield moved it) was, Whether ſhe might recover damages to fifty pounds there, where they cannot hold plea above forty ſhillings?—But the whole Court held, that the damages were well awarded; and that ſhe might well recover ſo much there; for as they may hold plea of the land, ſo for the damages as far as the demandant is damnified, and ſhall be well allowed (*a*). *Sed adjournatur.*

(*a*) It was alſo determined the debt would not lie in *B. R.* on the judgment; but that the remedy is in the manor court or in chancery. 4. Co. 306. See the ſtatute Merton, c. 1. *de Vidua*, &c. Moor, 415.

Case 26.

Atwood *againſt* Ballard.

To what place the *venire facias* ſhall be awarded.
Vide ante, 260.
Poſt. 472. 898.
Cro. Jac. 599.

TRESPASS for his cloſe breaking. The defendant juſtifies by reaſon of a way by preſcription from his franktenement in *D.* unto the vill of *S.* in the ſame county; iſſue was taken *de injuriâ ſuâ propriâ*, &c. and a *venire facias* awarded from the *viſne* of *D.* only; and thereby it was tried, and found for the plaintiff. And it was now moved in arreſt of judgment, that it was a miſ-trial; for the *viſne* ought to have been awarded from *D.* and *S.*—Gawdy. True it is, if the preſcription to have a way had been traverſed; and ſo it hath

hath been adjudged here: but by this replication the way is confeſſed; and it may be that he breaks his cloſe without uſing the way, for the way is not in queſtion. And of that opinion was POPHAM. But FENNER and CLENCH *è contra:* and therefore it was adjourned. *Vide* 13. *Hen.* 7. *pl.* 13. 21. *Hen.* 6. *pl.* 22. 34. *Hen.* 6. *pl.* 15. 10. *Edw.* 4. *pl.* 10. ATWOOD *againſt* BALLARD.

Bragg *againſt* Banning. CASE 27.

Hilary Term, 37. *Eliz. Roll* 1004.

ACTION upon the caſe. And declares, Whereas he and all thoſe, &c. have had a way from his houſe in *D.* over *Green-Acre* in *S.* and over *Black-Acre* into ſuch a place in *P.* that the defendant had ſtopped his way in *S.* Upon not guilty pleaded, it was found for the plaintiff.—And it was alledged in arreſt of judgment, that the declaration was not good, becauſe he alledgeth not in what vill *Black-Acre* was; for if the preſcription be traverſed, the *venire facias* ſhall be from every vill where the land is over which the way lies: and ſo it was adjudged in 33. *Eliz. Haukhurſt's Caſe* in the common pleas. Wherefore, &c. From what place the *viſne* ſhall come. Vide ante, 260. note (*a*) pl. 46. Poſt. 619. 751.

GAWDY. It is clear, that this is a fault for which the defendant might have demurred; for true it is, he ought to have alledged all the lands through which he is to have his way, and vills where they lie; and if the preſcription be traverſed, the *venire* ſhall be from every vill. But now when he pleads not guilty, the *venire* ſhall be from the vill, where the ſtopping is alledged; for the way is not principally in queſtion, but it ought to be proved upon the evidence.—And thereto all THE JUSTICES agreed. Wherefore it was adjudged for the plaintiff.

Vide 4. & 5. Ann. c. 16. and 24. Geo. 2. c. 18.

Pennyman *againſt* Rabanks. CASE 28.

ACTION upon the caſe for ſlandering his title. For that he ſaid to *J. S.* who was in ſpeech to buy the plaintiff's land, "I know one that hath two leaſes of his land, who will not part "with them at any reaſonable rate," *ubi revera nulla talis dimiſſio facta fuit.* The defendant juſtifies by reaſon of two ſeveral leaſes by *parol* made unto himſelf. The plaintiff replies *de injuriâ ſuâ propriâ abſque tali cauſâ.* Iſſue was joined, and found for the plaintiff.—It was now moved in arreſt of judgment, that an action lay not for theſe words; for he doth not ſay, that any had leaſes for years, but it might be well intended of leaſes at will, which are not any prejudice. *Sed non allocatur*; for it cannot be intended that he ſpake of leaſes at will, becauſe he mentions leaſes grantable over, and alſo ſuch as ſhall prejudice the purchaſor. Wherefore, &c.—SECONDLY, The declaration is not good, becauſe he concludes, *ubi revera nulla talis dimiſſio, &c.* whereas there be two leaſes mentioned, and this concluſion goes but to one, which is uncertain. *Sed non allocatur*; for *dimiſſio eſt nomen collectivum*, and comprehends both leaſes. As 15. *Eliz.* 325. "*Aſſiſe*," the plaintiff made two titles to two bars, the tenant ſaith, *Veign le Aſſiſe ſur le title*, that goes to both. Wherefore, &c.—THIRDLY, Becauſe it appears by the defendant's juſtification, that he intended of leaſes made of himſelf; Slander of title. Moor, 410. Ante, 338.

and

PENNYMAN *against* RABANKS. *Ante*, 197.

and if a man claim eſtates, although they be falſe he ſhall not be puniſhed. This was agreed by all THE COURT, that no action lay againſt one for ſaying, that he himſelf had title or eſtate in lands, &c. although it were falſe. But here the words in the declaration, as they are ſpoken, being in the third perſon, be not intendable of himſelf, but of ſome other, and import a ſlander to the plaintiff's title; and then his juſtification afterwards ſhall not take away that action which before was given to the plaintiff for the ſlandering of his title.—Wherefore rule was given that judgment ſhould be entered for the plaintiff, unleſs other matter was ſhewn upon the third day of the next term.—Afterwards *Paſch.* 38. *Eliz.* it was adjudged for the plaintiff, FENNER *contradicente*.

CASE 29.

The Queen *againſt* Bowles (*a*).

(*a*) See Ld. Ray. 260.

An indictment for perjury muſt ſhew that the ſubject matter of the oath was material to the cauſe in which the perjury was committed.

Raym. 202. Cro. Car. 351. 1. Keb. 452. 3. Hawk. P. C. ch. 69. ſ. 23. Dougl. 156. 1. T. Rep. 69.

ONE was indicted upon the 5. *Eliz.* c. 9. of perjury, for that there was a ſuit in chancery betwixt one *Marſhal and Harvie*, for the manor of *Staverton*, in the county of *Devon*, and a commiſſion was thereupon awarded to examine witneſſes; that the defendant ſwore, the deed of the feoffment of the manor (*manerium prædictum innuendo*) was delivered as an eſcrow to be delivered, &c. *ubi revera* it was delivered abſolutely, &c.—The firſt exception was, That this oath, that the deed of the manor was delivered as an eſcrow, &c. is not material, unleſs it be ſhewn that it concerned the manor in queſtion; for otherwiſe, although it were falſe, it is not puniſhable, neither by action nor by indictment upon the ſtatute. For the ſtatute is, "If a witneſs depoſe falſely "concerning any cauſe, &c." for which falſe oath he is not puniſhable by this ſtatute, unleſs it be ſhewn or averred how this concerns the cauſe.—And of that opinion was THE WHOLE COURT: and although it is alledged, *manerium prædict. innuendo*, yet it ſhall not help it; for a man ſhall not be puniſhed as a perjurer by an *innuendo*. Wherefore for this cauſe only the indictment was diſcharged.

CASE 30.

Caſtleman *againſt* Hobbs.

Hilary Term, 37. *Eliz.* *Roll* 334.

An *innuendo* cannot alter the common intendment of the words ſpoken by the addition of a *new fact*. Moor, 396. Owen, 57. Cro. Jac. 205. 4 Bac. Ab. 517. 1. T. Rep. 70.

ACTION upon the caſe for theſe words: "Thou art a thief, "for thou haſt ſtolen half an acre of my corn," *innuendo* "the "corn growing upon half an acre of ground reaped and put "into ſhocks by the defendant." Upon this declaration the defendant demurred.—And upon the firſt motion, without much arguing, it was adjudged for the defendant; for the ſtealing half an acre of corn cannot be ſaid to be felony; for it ſhall be taken in common parlance and intendment, corn growing upon the land which the plaintiff cut down and carried away; and the *innuendo* helps nothing, unleſs the words precedent have a vehement preſumption of the *innuendo*: and herein no man will intend that it was corn ſevered, when he ſaith "half an acre of my corn." Wherefore it was adjudged for the defendant.

Reynolds

Reynolds *againſt* Pinhowe.

CASE 31.

Trinity Term, 37. *Eliz. Roll* 337.

ASSUMPSIT. Whereas the defendant had recovered five pounds againſt the plaintiff; in conſideration of four pounds given him by the plaintiff, that the defendant aſſumed to acknowledge ſatisfaction of that judgment before ſuch a day; and that he had not done it. And it was thereupon demurred: for it was moved, that there was not any conſideration; for it is no more than to give him part of the money which he owed him, which is not any conſideration.—But all THE COURT held it to be well enough; for it is a benefit unto him to have it without ſuit or charge: and it may be there was error in the record, ſo as the party might have avoided it. Wherefore it was adjudged for the plaintiff.

Aſſumpſit will lie on a promiſe to acknowledge ſatisfaction on record, in conſideration of 4*l.* paid by the plaintiff for a debt of 5*l.* which the defendant had recovered againſt him.

Poſt. 538.

1. Roll. Ab. 28. Moor, 412. Cro. Car. 8. Sed vide Cowp. 128.

Woodroff *againſt* Vaughan.

CASE 32.

Michaelmas Term, 36. & 37. *Eliz. Roll* .

ACTION. For that he ſpake in the preſence of one *Lumley* theſe words of the plaintiff: "I did not know that WOODROFF," *innuendo* the plaintiff, "was thy brother: he hath forſworn himſelf; and I will prove him perjured, or elſe I will pay him his charges."—After verdict upon not guilty pleaded, and found for the plaintiff, it was moved in arreſt of judgment, Becauſe it is not averred that *Lumley* was brother to the plaintiff; and therefore it ſhall not be intended as ſpoken of the plaintiff, as it was agreed this Term in *Badcock's Caſe* (*a*). *Sed non allocatur*; for when it is alledged to be ſpoken in the preſence of one only, it cannot be intended but that it was the plaintiff, if the other *revera* be his brother; and therefore it may be well helped by the *innuendo*: but otherwiſe it is where it is ſpoken in the preſence of divers others, as in the caſe alledged.—Secondly, It was moved, that for theſe words an action lay not; for, for the words "he hath forſworn himſelf," an action is not maintainable; which was agreed PER CURIAM.—Then for the words, "I will prove him perjur'd, or elſe I will bear his charges," no action will lie. But THE WHOLE COURT reſolved to the contrary; for it is as great a ſlander as if he had ſaid directly that he was perjured: and it is not reaſon that by ſuch colourable addition to ſlanderous words, the party ſhould be without remedy. Wherefore it was adjudged for the plaintiff.

"I will prove "*him* perjured," are actionable words; and if ſpoken *in* the preſence of *one* perſon only, as *of* that perſon's brother, an *innuendo* will aſcertain it to be the plaintiff.

(*a*) Ante, 416. 1 Roll. Ab. 39. Moor, 365. 2. Jones. 5. 1. Com. Dig. 179.

Whitbie *againſt* Marſhall.

CASE 33.

EJECTIONE FIRMÆ, as leſſee of *Mr. Gray*, for lands in *Langley*, in the county of *Leiceſter*. At the *niſi prius* in the country, ſix of the jurors were challenged and *treited*, and the jury remained *pro defectu juratorum*. At the next aſſiſes a new *diſtringas* was awarded againſt all the firſt jurors, as well thoſe who were *treited* before as the others; and at the *niſi prius* in the country, the iſſue was tried by ſome of the jurors of the ancient panel, and by others returned upon a *tales de circumſtantibus* awarded; but none of them who were *treited* before tried it. The verdict was found for the plaintiff.—And it was now alledged in arreſt of judgment, that this *diſtringas* was ill awarded; for it ought

A ſecond *diſtringas* awarded againſt jurors who had been *challenged and withdrawn* from a former panel in the ſame cauſe, is a default helped after verdict.

Poſt. 430.

WHITBIE *againſt* MARSHALL.

ought not to have been awarded againſt them who were *treited*, but againſt the others only; and then the trial thereupon was ill. —But THE COURT held, that in regard it was but a judicial proceſs, which being awarded againſt them where it ought not to be, is but the default of the Court, and ſhall not turn the plaintiff to prejudice. It was a good trial by the common law, in reſpect the trial was by the lawful jurors; as alſo clearly by the ſtatute of jeofails, which helps miſ-awarding proceſs. Wherefore it was adjudged for the plaintiff.

CASE 34.

Moor *againſt* Vaughan.

It is a miſ-trial if any juror who has been challenged by the parties, afterwards tries the cauſe. Ante, 429.

TRESPASS. At the *niſi prius* the jurors were challenged, and the jury remained *pro defectu jurator.*; and afterwards a new *diſtringas* with a *niſi prius* was awarded againſt the ſame jurors who were *treited* before; and ſome of them who were *treited* appeared and tried it. And this matter was alledged in arreſt of judgment.—And held clearly by all THE JUSTICES, that it was a miſ-trial, and not aided by any of the ſtatutes of jeofails. Whereupon a *venire facias de novo* was awarded to have a new trial.

CASE 35.

Sir Edward Denny *againſt* Eakenſtall.

Hilary Term, 37. *Eliz. Roll* 882.

The glebe of an archdeaconry is not any part of the poſſeſſions of the biſhoprick; and a leaſe by the archdeacon made before 13. *Eliz.* will bind his ſucceſſors, tho' it be not confirmed by the biſhop until after 13. *Eliz.* c. 10. Ante, 18.

Moor, 636. Co. Lit. 300. b. 5. Co. 15. Cro. Car. 38. Cro. Jac. 53. 3. Bac. Ab. 389.

EJECTIONE FIRMÆ. Upon a ſpecial verdict it was found, that the archdeacon of *Ely* having the parſonage of *Haddon* appropriated to his archdeaconry, *anno* 12. *Eliz.* let the land in queſtion, being parcel of his glebe, for fifty years. The biſhop of *Ely*, being patron of that archdeaconry, and the dean and chapter of *Ely*, *anno* 15. *Eliz.* confirmed that leaſe. The archdeacon dies; the biſhop collates to that archdeaconry *J. S.* who enters, and let the land to the plaintiff. *Et ſi, &c.*

The firſt queſtion moved was, Whether this confirmation by the biſhop be not void by the ſtatute of 1. *Eliz.* c. 19. which makes all grants and aſſurances, &c. by a biſhop more than eſtates for twenty-one years, or three lives, to be void? *Et ſi ſic*, the leaſe made by the archdeacon is void againſt his ſucceſſor.—But all THE COURT held, that the ſtatute doth not extend thereto; for that ſtatute is intended of grants of lands, tenements, and hereditaments, parcel of the poſſeſſions of the biſhoprick, &c. But here the confirmation paſſeth not any eſtate, but it is an aſſent only to the leaſe of the poſſeſſion of the archdeaconry, and not of the biſhoprick; for it is not the alienation of the patron, and therefore not within the ſtatute: but otherwiſe it is where a biſhop is diſſeiſed, and confirms it to the diſſeiſor. Wherefore, &c.

Secondly, It was moved that this leaſe is void by the ſtatute of 13. *Eliz.* c. 10.; for the confirmation after the ſtatute ſhall not bind the ſucceſſor, although the leaſe made before the ſtatute ſhall bind him who made it.—But THE COURT thereto delivered not any opinion. *Sed adjournatur.*

Anonymous

Anonymous.

CASE 36.

COKE, *the Queen's Attorney*, demanded of the Court their opinion in this case. A man having two daughters, being his heirs, deviseth his land to them and their heirs, and dies: Whether they shall take as jointenants by the *devise*, or as coparceners by *descent*? —And all THE JUSTICES held clearly, that they shall have it as jointenants; for the devise giveth it them in another degree than the common law would have given it them, and for the benefit of the survivorship between them.

Female heirs to whom land is devised shall take as *jointenants*, and not as *coparceners*. Ante, 9. ost. 695.

3. Lev. 127. 1. Cr. 161. 2. Sid. 53. 780. Gouldf. 141. Comyn's Rep. 123. S. C. Owen, 65. 1. Leon. 315. 1. Salk. 342. 2. Ld. Ray. 830.

Doyle *against* Wood.

CASE 37.

Trinity Term, 36. *Eliz. Roll* 128.

TRESPASS. The defendant justifies as in his freehold. The plaintiff makes title, that this land is parcel of the manor of *D.* and demisable, time whereof, &c. by copy in fee, in tail, or for life, or for lives, &c. and that this land was let unto him by copy in fee. The prescription was traversed, and found that it had been demised and demisable, from time whereof, &c. in fee, but never in tail; and that it was granted to the plaintiff in fee.—It was thereupon held by THE WHOLE COURT, that it was found for the plaintiff. For the allegation that the land had been demisable in fee or in tail, &c is but a conveyance to his title: and forasmuch as it was found that it was demisable in fee, and that it was demised unto him in fee, that is the effect and substance of his title which is found for him, and sufficient. Wherefore the plaintiff had judgment to recover.

A prescription that land is demisable *in fee* or *in tail* is good, though in fact it was not demisable *in tail*, provided the title to it be *in fee*. Ante, 41. 415. Moor, 359. Cowp. 47.

Stafford *against* Bateman.

CASE 38.

Hilary Term, 37. *Eliz. Roll* 118.

TRESPASS upon demurrer. The case was, That by virtue of a *fieri facias* out of the exchequer for the queen's debt, the defendant took the plaintiff's beasts, being *levant and couchant* upon the land of the debtor, and fold them for the queen's debt.—And adjudged that it was not lawful; for they were not to be sold as the goods of the debtor, but they might have been distrained for the queen's debt. Wherefore, &c. (*a*).

The cattle of a third person *levant and couchant* upon the lands of the queen's debtor cannot be sold for such debt under a *fieri facias*, but may be distrained. 2. Com. Dig. 646. 2. Roll. Ab. 159. Salk. 395. Skin. 618. Comb. 469. 308. 12. Mod. 178. Carth. 444. Ld. Ray. 305.

(*a*) This is not law. *L. C. B.* PARKER's *MSS.*

Morgan *against* Williams.

CASE 39.

Michaelmas Term, 36. & 37. *Eliz. Roll* 319.

DEBT, as administrator to one *Philips*. And declares, That administration of the goods of *Philips* were committed *per Andream Vane, sacræ theologiæ doctorem*, such a day *apud Monmouth*, and the plaintiff recovered in the common pleas by default; and writ of error was thereof brought. The error assigned was, Because it is not shewn that *Vane* was ordinary of *Monmouth*, nor that the committing of administration appertained unto him.—And in regard it was in a declaration, which ought to be certain, and he is not a bishop, nor any person who may be intended to be the ordinary, the judgment was therefore reversed.

A suit on an administration granted by a peculiar, must shew that he was ordinary. Ante, 102. Post. 791. Moor, 367. 1. Lut. 408. Cro. Jac. 556. 1. Sid. 228. 1. Salk. 38. 41.

Show. 355. 4. Mod. 133. Skin. 551. 2. Bac. Ab. 442. 5. Com. Dig. 207.

CASE 40.

Samon *against* Pitt.

Trinity Term, 36. *Eliz. Roll* 877.

An award that the defendant shall enter into a bond, *without naming what sum*; and that HE *and* HIS WIFE (she not being a party to the submission) should have the lands in controversy, is void *for uncertainty* in the first case, and *repugnancy* in the second.

Ante, 4.
Post. 726.
5. Co. 77. b.
1. Roll. Ab. 243.
Moor, 359.
Brownl. 92.
Roll. Rep. 271.
Dy. 242.
Yelv. 78.
Cro. Jac. 314.
Lev. 88.
Sid. 270.
Style, 365.
2. Saund. 292.
6. Mod. 231. 244.
Salk. 76. 498.
Skin. 248.
Ld. Raym. 1076. 1078.
Burr. 277, 278.
2. Bac. Ab. 35.

ASSUMPSIT. And declares, Whereas there were divers controversies between the plaintiff and defendant concerning divers lands in *D.* whereupon they submitted themselves to the arbitration of *J. S.*; that the defendant assumed, in consideration of sixpence, to perform such award as *J. S.* should make; and alledgeth, that *J. S.* awarded that the defendant should enter into a bond to the plaintiff, that the plaintiff and *Elizabeth* his wife *haberent et gauderent* all the lands in controversy excepting seven acres; and for non-performance of this arbitrament the action was brought. Upon this declaration it was demurred in law; and it was argued *for the defendant*, that this award was void.—First, Because it is awarded that he shall enter into bond: and it is not set down in what sum he should be bound; so he knows not how to perform it: and if he should enter into bond without a sum, it were void; and the arbitrament being void, the defendant is not bound to perform it.—Secondly, The award is void in this, that they awarded he should be bound that the plaintiff and his wife should enjoy, &c. and the wife is not party to the submission, nor is to have any benefit by the award; for the arbitrators have not any power to award a thing to be done to a stranger.—But TANFIELD, *for the plaintiff*, moved, that the award was good, notwithstanding these exceptions. For as to the first, although it be not shewn in what sum the defendant shall be bound, yet he is to tender an obligation in some sum; and it is at his election in what sum he will be bound, be it never so small. And as to the second, the arbitrament is good; for although it be void as to the *feme*, because she is not a party to the submission, yet to be bound that the *baron* shall enjoy it is good as to him; as 18. *Edw.* 4. 22. and 19. *Edw.* 4. that the party and a stranger as his surety shall be bound, it is void as to the stranger, but is good as to the party, and he himself ought to enter into the bond.—But as to the first, all THE COURT held it to be a void arbitrament; for the arbitrators are absolute judges, and therefore ought to decide absolutely and certainly what shall be done: and they cannot give their authority unto us, or to the party to make certain their uncertainty, no more than they may make an award that *J. D.* shall make an award between the parties, for their authority is not transferrable; and therefore this award being uncertain is void, and the parties are not bound to perform it.—But POPHAM and FENNER said, that if he ought to enter into any bond, it ought to be in a sum according to the value of the profits of the land; and therefore if *A.* covenant to enter into bond for the enjoyment of such land, without naming any sum, it ought to be the sum according to the value of the land (*a*): as 8. *Ass.* an annuity is granted to a man until he be promoted to a benefice, he need not accept a benefice of a lesser value than the annuity.—And POPHAM held the arbitrament to be void for the second cause; for it being an entire thing that was appointed to be done, being void in part, it is void for the whole: but otherwise it is where he appoints two things to be performed, and the one is within the submission, and the other not, and they are awarded to be performed severally, it is good for that which is within the submission, and void for the other. But to

(*a*) Samon's Case, 5. Co. 78.

this

this point, none of the other Juſtices ſpake. But for the firſt cauſe principally without other argument it was adjudged for the defendant. 5. *Co.* 77. b. SAMON *againſt* PITT.

Sir Chriſtopher Hilliard *againſt* Conſtable. CASE 41.

Vide Ante, Page 306. *Caſe* 5.

ACTION for words was now moved again.—GAWDY and FENNER held, that for the words, "He is a blood-ſucker, "and ſucketh others blood," (for all the other words, ALL THE JUSTICES agreed that they were not actionable) the action lies not; for they are not words which of themſelves import any defamation; for it is uſual when a juſtice of peace purſues offenders, and does his office, to call him "blood-ſucker"; and it is not any ſlander unto him, and may be taken in ſome good ſenſe in executing his office, and not *in malam partem*, that he is a blood-ſucker in ſeeking murder or otherwiſe.—POPHAM and CLENCH *è contra*; for it ſhall be conſtrued according to the common intendment of the word, which is always *in malam partem*; and to ſuck blood is to take blood unjuſtly from a perſon. Wherefore, &c.—Afterwards the ſame Term at *Serjeants Inn*, before all the Juſtices of *England* there aſſembled, this caſe was moved, and the greater part of them reſolved, that the action lay not (but I heard not their particular reaſons). Wherefore the next day by the aſſent of POPHAM and CLENCH, it was commanded, that judgment ſhould be entered for the defendant.

"*He is a blood-ſucker, and ſucketh others blood*," are not actionable, tho' ſpoken of a juſtice of peace. S. C. Ante, 306. 1. Roll. Ab. 57. Moor, 418. 3. Wilſ. 184. 2. Bl. Rep. 751. 791.

Sir Walter Hungerford *againſt* Veiſey. CASE 42.

Eaſter Term, 37. *Eliz. Roll* 249.

ERROR upon a judgment in the common pleas. The error aſſigned was, Becauſe the *venire facias* was awarded upon the roll returnable *die Mercurii proxim. poſt Craſtin. Trinitatis*: but the writ itſelf was returnable *die Veneris proxim. poſt Craſtin. Trinitatis*, which was the firſt day, and therefore erroneous, becauſe the writ by the roll was returnable out of Term.—And it was held clearly to be erroneous; for the roll is that whereto the Court gives credit, and not to the writ: for if the writ were ill, it ſhould be reformed by the roll, and that was clearly erroneous at the common law, as appears 7. *Edw.* 4. *pl.* 15. 2. *Rich.* 3. *pl.* 11. 4. *Eliz.* 211. and it is not aided by the ſtatute. But if it doth not appear that any writ was awarded, it is aided by the ſtatute, but not an ill writ. *Sed adjournatur.*

If proceſs be awarded on *the roll* returnable *out of term*, the error is not aided by the verdict. Ante, 340. Poſt. 572. 618. 622. Moor, 402. 465 1. Roll. Abr. 204.

Aſcue *againſt* Sanderſon. CASE 43.

Eaſter Term, 37. *Eliz. Roll* 218.

ACTION upon the caſe, *ſur trover* of 300 ſheep, the 1. *Dec.* 36. *Eliz.* The defendant pleaded, that he was ſheriff of the county of *Lincoln*, and that *J. S.* recovered againſt the plaintiff 100l. and thereupon had a *fieri facias* to levy that debt, which writ was returnable *Craſtino Animarum* 35. *Eliz.* That this was delivered to him, being then ſheriff of the ſaid county, upon the 1ſt of *Oct.* 35. *Eliz.* to be executed. That he by force thereof, upon the 20th *Oct.* 35. *Eliz.* took the ſaid 300 ſheep, and ſold upon the 22d *Oct.* 35. *Eliz.* 104 ſheep for 40l. parcel of the ſaid 100l. and that the other 192 ſheep remained in his hands *pro defectu emptorum.*

Pleading in trover. 1. Com. Dig. 224.

ASCUE *against* SANDERSON.

rum. And at the ſaid day of *Craſtin. Anim.* he returned the ſaid writ accordingly, and all this matter; which is the ſame converſion, ABSQUE HOC that he converted them *aliter vel alio modo*. It was thereupon demurred.—After argument, the whole Court held the plea to be inſufficient.

Poſt. 435. Poſt. 555. Ante, 146. 268. Yelv. 198. Latch. 185. Salk. 634. Ld. Raym. 393. 5. Com. Dig. 219. Poſt. 439.

FIRST, and principally, Becauſe he doth not by his plea confeſs any converſion, and then the traverſe is ill: but he ought upon this matter to have pleaded not guilty, and have given it in evidence.

SECONDLY, Becauſe the declaration ſuppoſeth the trover and converſion to be the 1ſt *Dec.* 36. *Eliz.* and he juſtifies the converſion in *October*, 35. *Eliz.* ſo he meets not with the plaintiff in time; and therefore he ought to have traverſed it: and the traverſe *aliter vel alio modo* ſhall never anſwer to the time, but to the manner of the converſion.

THIRDLY, He makes not any juſtification for four of the ſheep, but that he ſeized them: but he ſhews not what he did with them: wherefore the plea doth not anſwer all that which is compriſed in the declaration, and for that cauſe is ill in all. And of that opinion was ALL THE COURT, and appointed judgment to be entered for the plaintiff; but after cauſed it to be ſtayed for the equity of the matter.

CASE 44.

Staughton *againſt* Newcomb.

Michaelmas Term, 35. & 36. *Eliz. Roll* 381.

Variance between the original and the declaration is fatal. 1. Saun. 27, 28. Cowp. 178.

ERROR upon a judgment in debt in the common pleas. The error aſſigned was, Becauſe the record is, *quod obtulit ſe in placito debiti de* 10*l.* and when he declared, he declared for a debt of 20l.—And it was held to be a manifeſt error.

CASE 45.

Johnſon *againſt* Pays.

An action *by bill* lies on the 5. *Eliz.* c. 9. by the party grieved, notwithſtanding 18. *Eliz.* c. 5. Poſt. 645. Ante, 76. 5. Leon. 237. 1. Roll. Ab. 536. 3. Inſt. 125. and ſee note (q)

BILL OF DEBT upon the 5. *Eliz.* c. 9. of perjury. After verdict it was moved in arreſt of judgment, that by the 18. *Eliz.* c. 5. no ſuit ſhall be upon a penal ſtatute, but by information or original action; ſo this bill is not maintainable. But it was thereto anſwered, that in the ſame ſtatute is a proviſo, where the action is given to the party grieved, and not to him who will ſue generally that he may ſue as before.—Wherefore, upon view of the ſtatute, it was held to be maintainable, and adjudged for the plaintiff.

Cro. Car. 603. 2. Hawk. 381. 2. Ld. Ray. 1333. 5. Burr. 2722. Cowp. 429. Leigh v. Kent, 3. T. Rep. 365.

CASE 46.

Stile *againſt* Butts.

Trinity Term, 37. *Eliz. Roll* 159.

A commoner who has right to dig and take clay cannot juſtify taking that which another has dug, tho' he is no commoner. 1. Roll. Ab. 567. Moor, 411. Cro. Jac. 256. 3. Lev. 323. 2. Ter. Rep. 391.

TRESPASS, for carrying away thirty loads of clay in *Brookbank-Green*, digged there by the plaintiff. The defendant pleads, that he is a tenant and inhabitant in *Brookbank*, whereof the ſaid place called *Brookbank-Green* is parcel; and that there is a cuſtom there, that every tenant and inhabitant there may dig, have, and carry away clay in *Brookbank-Green* for his neceſſary uſe; and that the plaintiff, not being a tenant there, *de ſon tort demeſne* digged that clay, and laid it upon the land; wherefore he took it for his neceſſary uſe, as lawful it was for him to do: and it

was

was thereupon demurred.—And upon the first motion, without any argument, THE COURT held the justification to be ill. For by the prescription it appears, that the tenant might dig and have clay; then he cannot have but what he himself digs, and he shall not have that which is digged by a stranger; for it is reasonable he should have what himself digged, but it doth not warrant him to take what another hath digged, who peradventure did it lawfully by the lord's licence. This is also like to common, which appertains not to the tenant, nor is his until it be taken by the mouth of his cattle; and if a stranger there cuts the grass, the commoner cannot carry it away, nor have his action of trespass, &c. no more here. Wherefore it was adjudged for the plaintiff.

CASE 47.

John Vita *against* James Vita.

Michaelmas Term, 36 *and* 37. *Eliz. Roll* 265.

On *nil debet* pleaded, if the entry is, *et prædictus defendens similiter*, instead of *prædictus querens*, it shall be amended. Ante, 79. Post. 752. 904. 8. Co. 159. a. Cro. Jac. 67. Salk. 49. 1. Bac. Abr 108. 1. Ser. Rep. 783.

ERROR upon a judgment in *Ipswich*, in debt for twenty pounds, by *John Vita* against *James Vita*. The defendant pleaded *nihil debet, et de hoc ponit se super patriam*; and the issue was entered, *et prædictus Jacobus similiter*, where it ought to have been *Johannes*; and tried; and adjudged for the plaintiff. And this was the error assigned.—And ALL THE COURT held it to be amendable by the 8. *Hen.* 6. c. 12. which gives authority to amend records removed out of the common pleas by error for faults which happened *per vitium scriptoris*, or by the clerk's negligence: and this statute extends as well in equity to the records of other courts, which are not removed for error. Whereupon it was awarded to be amended, and the judgment was affirmed.

1. Stra. 551, 642. 1.

CASE 48.

Dee *against* Bacon.

Easter Term, 37. *Eliz. Roll* 472.

The justification of *damage feasant* in trover, without confessing conversion, is bad; and amounts to the general issue.

ACTION upon the case, upon trover and conversion of goods. The defendant justifies the taking of them *damage feasant*, ABSQUE HOC he converted them *aliter vel alio modo*. And it was thereupon demurred in law; for the traverse is not good, because he confesseth not any conversion; the plea also amounts to a *non culp.*—Wherefore without argument it was adjudged for the plaintiff.

Ant. 146. 434. Hob. 187.

CASE 49.

Perkins *against* Clark and Cleydon.

An executor sells goods of his testator, and dies before he receives the money.—*Quære*, what remedy an administrator of the first testator shall have to recover it?

Went. 148.

ASSUMPSIT. The case was, A man devised his land to be sold by *J. S.* his executor. *J. S.* sells it for forty pounds, and dies intestate before his receipt of the forty pounds. Administration of the goods of the first testator was committed to the plaintiff. Whether he should have an *assumpsit* for this forty pounds, or had any other remedy, was moved by SPURLING, *serjeant*.—GAWDY. It is a good case; for the money, if it be recovered, is assets in their hands: but he conceived the administrator should not have an action to recover it. And CLENCH thereto agreed: but the other Justices would not deliver any opinion, but said it was fitting to consider thereof.

Yelv. 33. 83. 1. Jones, 214. 248. Moor, 4. 139. 686. O. Bend. 2. pl. 5. N. Bend. 18. pl. 24. Cro. Jac. 394. Cro. Car. 167. 227. 451. 2. Saund. 149. 1. Roll. 890. 907. 1. Sid. 29. March. 9. 1. And. 23. 1. Com. Dig. 251. Ld. Ray. 1049.

By 25. *Edw.* 3. c. 5. executors of executors shall have actions of debt and goods of the first testator in the same manner as the testator himself, and shall answer to others as the first executor should do. And by 17. *Car.* 2. c. 8. an administrator *de bonis non*, &c. may sue a *scire facias*, and take out execution on a judgment obtained by his intestate. See also 8. and 9. *Will.* 3. c. 10.

Case 50.

Rofs *againſt* Morris.

If an *aſſumpſit* be alledged in the "*county aforeſaid*," it ſhall be taken to relate to the county named in the margin, if the next antecedent county named be only by way of recital. Ante, 311. Poſt. 465.

ASSUMPSIT brought in *Suffolk*. And declares, *quòd cùm proſecutus fuit un brief de ſubpœna* out of the chancery *apud Weſtm. in comitatu Midd.* and intended to ſerve it; the defendant *apud Hepworth in comitatu prædict.* aſſumed, that if he would not ſerve the writ that he would give him ſo much, &c. Upon *non aſſumpſit* pleaded, and found for the plaintiff by a jury of *Suffolk*, it was now moved in arreſt of judgment, that it was a miſ-trial: for although *Suffolk* was in the margent, yet the chancery *apud Weſtm. in comitatu Midd.* is laſt named in the record; then when the *aſſumpſit* is alledged *apud Hepworth in comitatu prædict.* this *comitatu prædict.* refers to the county laſt named, *viz. Midd.* and then the trial in *Suffolk* is ill. Wherefore, &c.—And of that opinion was GAWDY upon the firſt motion.—But afterwards being moved again, becauſe the county of *Middleſex* is not mentioned but in the recital, and not in the ſubſtance of the record; and the *aſſumpſit* is alledged to be made *apud Hepworth in comitatu prædict.* and *Suffolk* is put in the margent of the record, and there the action is brought; *Hepworth in comitatu prædict.* ſhall be intended to be referred to the county named in the margent of the record, and not to the county mentioned by way of recital, and ſo the trial may be intended there. Whereupon ALL THE COURT reſolved, that it was well enough; and it was adjudged for the plaintiff.

Cro. Jac. 96. 618. 2. Vent. 272. 3. Wilſ. 339.

If there be two counties in an indictment, and the offence be charged ſo as to leave the right county uncertain, it is bad.

BUT NOTE, in the ſame Term an exception was taken to the indictment of one *Grymes*, who was indicted of burglary *apud Hereford*, for that *Hereford* was in the margent of the indictment, and the indictment was, *quòd Richardus Grymes de D. in comitatu Radnor. generoſus, fecit burglariam apud S. in comitat. prædict.* And for this cauſe exception was taken, for that two counties were named, the one in the margent, the other in the indictment; ſo it is uncertain to which of them *comitatu prædict.* ſhall be referred; and if it ſhould refer to the laſt mentioned, it is clearly ill: and for this cauſe divers indictments have been diſcharged.—And THE COURT held it to be an apparent and groſs fault here.—*Quære*, Whether there be not a difference between theſe caſes, becauſe the county is mentioned in the body of the indictment?

Case 51.

Noke *againſt* Awder.

Ante, Page 373, *Caſe* 21.

In an action of covenant by an aſſignee, the declaration need not ſhew the deed of aſſignment; provided the ſubject in diſpute may be aſſigned without a deed; altho' the covenant on which the action is brought ought to be by deed.

IT was now moved again.—And ALL THE JUSTICES agreed, that the aſſignee ſhall have an action of covenant without ſhewing any deed of the aſſignment; for it is a covenant which runs with the eſtate; and the eſtate being paſſed without deed, the aſſignee ſhall have the benefit of the covenant alſo: and the executor of the *baron*, who is aſſignee in law, who comes in without deed, ſhall have the benefit of ſuch a covenant, as appears 30. *Edw.* 3. in *Symkins Simonds' Caſe*. And POPHAM and FENNER held, that a feoffee ſhall vouch by a warranty made to his feoffor, without ſhewing any deed of aſſignment: for the deed of aſſignment is not requiſite, nor is it to any purpoſe to

Ante, 373. Moor, 419. 5. Co. 18. 2. Mod. 116.

ſhew

ſhew it; for it appears by the books, that being ſhewn, it is not traverſable by the vouchee. And as a warranty or covenant is not grantable, nor to be aſſigned over without the eſtate; ſo when the eſtate paſſeth, although it be by parole, the warranty and covenant enſue it; and the aſſignee of the eſtate ſhall have the benefit thereof.—COKE *Attorney General* (who was of counſel with the defendant) ſaid, that the law was clear as you have taken it, yet the declaration is ill; for he declares, *quòd cùm Johannes King*, 10. *Eliz.* let that to the defendant for years, *virtute cujus* he was poſſeſſed, and granted it to *Abel* by indenture with the covenant, who in 15. *Eliz.* aſſigned it to the plaintiff: and further alledgeth, that long time before that the ſaid *J. K.* had any thing, one *Robert King* was ſeiſed in fee, *viz.* 7. *Eliz.* and ſo ſeiſed, died ſeiſed in 15. *Eliz.* and it deſcended to *Thomas King*, who entered upon the plaintiff and ouſted him: ſo he doth not ſhew that *John King* who made the leaſe had any thing; for *Robert King* was thereof then ſeiſed. And then when *John King* let to the defendant, and he granted his term by indenture, nothing paſſed but by eſtoppel; then the leſſee by eſtoppel cannot aſſign any thing over, and then the plaintiff is not an aſſignee to maintain this action. But admitting that *J. K.* had at the time of the leaſe made by him, a leaſe for a greater number of years, and that *Robert King* had the freehold, and thereof died ſeiſed, and ſo all might be true which is pleaded; then the entry of *Thomas King* upon the defendant is not lawful. So *quâcunque viâ datâ*, this action cannot be maintained. And this point for the caſe of eſtoppel was adjudged in this court, in the caſe of *Armiger v. Purcas*, in a writ of error.

NOKE *againſt* AWDER.

1. Salk. 141. Stra. 814. Ld. Ray. 1536. 2. Com. Dig. 562. Dougl. 667.

And all THE COURT held here, that it was clear upon the matter ſhewn, that the action lay not; for the plaintiff ought to have ſhewn an eſtate by deſcent in *J. King*, at the time of the leaſe and aſſignment made, or an eſtate whereby he might make a leaſe, and that this was afterwards determined; and ſo confeſs and avoid the eſtate in the leſſor, otherwiſe this action of covenant lieth not; and it never lies upon the aſſignment of an eſtate by eſtoppel. Wherefore they were of opinion to have then given judgment againſt the plaintiff; but afterward they would adviſe until the next Term.—NOTE. This was continued until *Trin.* 41. *Eliz.* and then being moved again, all THE JUSTICES reſolved, that the aſſignee of a leaſe by eſtoppel, ſhall not take advantage of any covenant; but that it ſhall not be intended a leaſe by eſtoppel, but a lawful leaſe. But no ſufficient title being ſhewn to avoid it, it is then as an entry by a ſtranger without title, which is not any breach. Wherefore it was adjudged for the defendant.

The aſſignee of a leaſe which appears to be good only by *eſtoppel*, cannot maintain an action on the covenants. Ante, 373.

Moor, 27. 419. 5. Co. 18. a. Shower, 4. 3. Lev. 154. 1. Term Rep. 86.

See 32. Hen. 8. c. 34.

Bateman *againſt* Allen.

CASE 52.

Trinity Term, 36. *Eliz. Roll* 339.

EJECTIONE FIRMÆ of a leaſe of *William Hill* and *Ann* his wife, 14. *Martii*, 36. *Eliz.* for one-and-twenty years of land in *Uttaxton* in the county of *Stafford*. Upon not guilty pleaded, the jury found a ſpecial verdict, that *Henry Clark* was ſeiſed in fee, by his will deviſed that land *pront in Newys et Scholaſtica's Caſe* And further ſhews, that the teſtator had iſſue *Francis* and

A ſpecial verdict in which the jury have omitted to find a neceſſary fact, is bad. Gilb. Eq. Rep. 255. 2. Ro. Abr. 693. 12. Mod. 628.

(a) Plowd. 408.

BATEMAN *againſt* ALLEN.

John his ſons, and *Scholaſtica* and *Ann* one of the leſſors; and that *Francis* and *John* died without iſſue male; that *Scholaſtica* took to huſband *Newys*; which *Newys* and *Scholaſtica* levied a fine of that land; whereupon *William Hill* and *Ann* his wife, as in right of *Ann*, entered for the forfeiture upon *Rhodes* the conuſee, and let it to the plaintiff, *prout* in the declaration; whereupon the defendant entered and ouſted him. *Sed utrùm* the entry of the defendant upon the matter be lawful or not, they prayed the advice, &c. And if his entry were lawful, they found for the defendant; and if not, &c. So all the matter found in *Scholaſtica's Caſe* was now in queſtion again.—But WILLIAMS, *ſerjeant*, moved, that foraſmuch as in all the verdict it is not found that the defendant had the *primer* poſſeſſion, nor that he entered in the right, or by the command of any who had title, but it is found that he entered upon the poſſeſſion of the plaintiff without any title, his entry is not lawful, and the plaintiff had good cauſe of action againſt him: wherefore the plaintiff ſhould recover.—And ſo held all THE COURT, that for this cauſe judgment ought to be given for the plaintiff, and they would not hear any argument of the matter in law. But if the concluſion of the verdict had been *ſi*, &c. Whether the entry of *Hill* and his wife were lawful or no? then the judgment ſhould have been upon the matter in law: for then it ſhould be intended that the defendant had title, if the leſſor of the plaintiff had not title, and that the plaintiff had not cauſe of action; but now not.

But then it was moved, that the plaintiff notwithſtanding ſhould not have judgment; for he hath declared of a leaſe by *baron* and *feme*, and he doth not ſhew it to be *by deed*, and without a deed it cannot be ſaid the leaſe of the *feme*. And in proof thereof, *vide Plowd.* 436. *Dyer*, 91. 15. *Edw.* 4. *pl.* 8.

A leaſe by huſband and wife may be pleaded as the leaſe of both, during the coverture, without ſaying it was by deed.—Yelv. 1. 2. Brown, 248. Cro. Jac. 332. 617. Co. 2. 51. b. Poſt. 481. 656. 708. 3. Bac. Ab. 306. 3. Co. 16. 21. Savil, 111. Dyer, 91. b. Plowd. 405. Co. 2. 61. a. 1. Burrow, 78. Dougl. 329.

But all THE JUSTICES held it to be well enough; for it may be intended by deed, and yet no declaration thereupon. Alſo, although it be without deed, it is well enough, at leaſtwiſe during the life of the *baron*; and it is a leaſe from them both, during that time.

If a ſpecial verdict in ejectment find an entry on the plaintiff, without finding title or poſſeſſion in the defendant, the plaintiff ſhall have judgment. 5. Com. Dig. 163. 171.

SECONDLY, It was moved, that it was found that *Hill* and his wife entered upon *Rhodes*, the conuſee of the fine, and made the leaſe to the plaintiff, and it is not found that they expelled *Rhodes*; and then it reſts upon the matter in law, Whether the plaintiff hath any leaſe? For if they entered, and their entry be not lawful, and they did not expel *Rhodes* (which is not averred), but *Rhodes* may be intended to continue in poſſeſſion; then they gained no poſſeſſion, and the leaſe to the plaintiff is void, and he hath not any cauſe of action; ſo it reſts upon the matter in law to be decided.

But all THE JUSTICES held it to be good enough; for it ſhall not be intended that *Rhodes* was upon the land, but that they by their entry gained the poſſeſſion: and although they be in as diſſeiſors, their leaſe is good to the plaintiff, and the defendant without title is not to eject him. Wherefore, without any regard to the matter in law, the plaintiff had judgment to recover.

Woodliff *againſt* Drury.

CASE 53.

A uſe to the feoffor and his wife *that ſhould be* in tail, is good, if the marriage takes place while the uſe exiſts; and whenever the *contingency* happens, the ſtatute will immediately convey the uſe into poſſeſſion. Ante, 46. Poſt. 827. 2. Roll. 792. Moor, 96. 634. 391. 1. Arid. 42. 316. 2. Leon. 14. 179. 223. Dyer, 274. pl. 42. 340. 3. Leon. 253. 4. Leon. 234. 12. Co. 48. 56.

TRESPASS. After verdict, COKE, *Attorney General*, moved in arreſt of judgment. The caſe upon the pleading was, That one made a feoffment; and it was declared by the indenture, that it ſhould be to the uſe of himſelf and *A.* his *feme* that ſhould be, after their marriage, and of the heirs of their bodies; and he took *A.* to *feme*. Whether ſhe ſhould take by the limitation of this uſe? was the queſtion.—And he moved that ſhe ſhould not: for preſently by this feoffment, the fee is in the *baron* by the poſſeſſion, executed to the uſe which he had before the marriage; which cannot after the marriage be divided, and made an eſtate tail in him; for he had the fee in him until the marriage: for it might have been that the marriage had never taken effect, and that would have confounded the other uſe, and uſes *in futuro* ſhall not riſe upon ſuch future acts; for then an uſe ſhould riſe out of an uſe. *Dyer*, 155.—But all THE JUSTICES held, that although he be ſeiſed in fee in the mean time, as in truth he is; yet by the marriage the new uſe ſhall ariſe and veſt, if there be no act in the mean time to deſtroy that future uſe (as it was in *Chudley's Caſe*) (*a*), according to the limitation of the uſe. And judgment was given accordingly for the plaintiff.—*Vide ſtatute* 27. *Hen.* 8. c. 10. *for transferring uſes into poſſeſſion.*

2. And. 198. Pollexfen, 78. 1. Co. 101. a. 130. a. 134. b. 138. Co. Lit. 187. b. 13. Co. 56. Lit. Rep. 290. 10. Mod. 423. Fearne, 199. 2. Bl. Com. 334.

(*a*) 1. Co. 120. Poph. 70. Jenk. 276. 1. And. 303.

Grills *againſt* Ridgeway.

Hilary Term, 37. *Eliz. Roll* 345.

CASE 54.

An action for an eſcape will not lie againſt the ſheriff *after* he has re-taken the priſoner upon freſh ſuit; but if he ſtates the eſcape to have been on a different day than that alledged, it will be error. Ante, 44. 102. 318. 434. 3. Co. 52. 2. Salk. 628. 2. Wilſ. 205. 2. Term Rep. 174.

DEBT upon an eſcape, ſuppoſing that the defendant, ſheriff of *Devonſhire*, ſuffered one *Chawner*, who was in execution, to eſcape in *London*, the 18. *Decemb.* 34. *Eliz.* 3. *Co. fol.* 52. The defendant pleads, that the ſaid priſoner eſcaped the 16. *December* in *D.* in the county of *Devon*; and that he freſhly purſued him; and by freſh ſuit took him again the 17. of *December*, and retained him in execution again; ABSQUE HOC that he is guilty *aliter vel alio modo*. And it was thereupon demurred; and argued for the plaintiff, that inaſmuch as he was once eſcaped, and thereby cauſe of action to the plaintiff, no freſh ſuit may take away that action from him. But the priſoner being re-taken, ſhall not peradventure take advantage of his own wrong to help himſelf, by *audita querela* thereupon; and in proof thereof, *vide* 13. *Hen.* 7. *pl.* 1. 14. *Hen.* 7. *pl.* 1. 5. *Edw.* 6. "*Eſcape*" *Bro.*—But all THE JUSTICES ſaid, that as to that, an action of debt did not lie againſt the ſheriff, where the ſheriff uſed his endeavour, and took him again upon freſh ſuit, although that in the night or otherwiſe he might loſe the ſight of him. But if before he be re-taken the party brings his action of debt, then the re-taking of him afterwards ſhall not avoid the plaintiff's action, although the re-taking be upon freſh ſuit.—A ſecond matter was moved, that the eſcape is ſuppoſed 18. *December*, 34. *Eliz.*; and he pleads that the priſoner eſcaped 16. *December*, and the re-taking was 17. *December*; ſo he anſwers not to the eſcape mentioned in the declaration: for the traverſe *aliter vel alio modo* doth not anſwer to the time, but to the manner of any thing alledged; and for that *vide* 33. *Hen.* 6. *pl.* 28. 37. *Hen.* 6. *pl.* 27.—And of that opinion were all THE JUSTICES at this time, except POPHAM, that the plea was ill for that cauſe. *Sed adjournatur.*

Michaelmas Term,

37. and 38. Eliz. In the Common Pleas.

Sir Edmund Anderſon, *Knt. Chief Juſtice.*

Sir Francis Beaumond, *Knt.*
Thomas Walmſley, *Eſq.*
Thomas Owen, *Eſq.*
} *Juſtices.*

Sir Edward Coke, *Knt. Attorney General.*

Sir T. Fleming, *Knt. Solicitor General.*

Boucher *againſt* Wiſeman.

CASE 1.

The office of ſheriff continues until he has regular notice of his diſcharge.

Dyer, 355. in marg. Moor, 186, 364.

ACTION upon the caſe againſt the defendant, late ſheriff of *Eſſex*. Whereas the plaintiff had recovered againſt *Pynder* 100l. and had a *fieri facias*; that the defendant by virtue thereof levied 28l. and had not returned the writ, nor paid the money to the plaintiff. The defendant pleaded not guilty. And now upon evidence to the jury it was proved, that the writ was delivered to *Cowell*, the defendant's under-ſheriff, 9. *Nov.* 34. *Eliz.* and the ſame day he made execution. And he proved, that the ſame day a writ of diſcharge was delivered him, dated 6. *Nov.* 35. *Eliz.*—But becauſe he did not prove that he had notice of this writ of diſcharge before the execution ſerved, THE COURT held clearly, that he was yet ſheriff, and chargeable to the plaintiff's action.

In the appointment of under-ſheriff, an exception that he ſhall not meddle with writs above ſuch a value, is repugnant and void.

THE defendant alſo ſhewed the indenture whereby he made *Cowell* his under-ſheriff; wherein was an exception, that he ſhould not meddle with the execution of any writ above 40l.; ſo as to that he was not his under-ſheriff, but he did it *de ſon tort demeſne*, and the defendant is not chargeable therewith.—But all THE COURT held it to be a void exception: for when he made him his under-ſheriff, therein was included that he ſhould execute all writs; and therefore the exception is repugnant and void.

Ante, 12. 294. 2. Brownl. 281. Hob. 13. 12 Mod. 468. See 12. G. 2. c. 13. ſ. 4.

A *fieri facias* binds the goods of the defendant from the date of it, and overreaches a *bonâ fide* ſale on that day.

THIRDLY, It was alledged, that this was not a due execution; for *Pynder* had made a deed of his goods before, &c. and ſhewed the deed dated the ſame day of the writ of execution.—ET PER TOTAM CURIAM, although the gift were *bonâ fide*, yet execution might be taken of thoſe goods. For by the ſuing forth the execution, all the defendant's goods are liable; ſo as no gift of the ſaid goods, the day of the date of the writ or afterwards, can ſtop the execution (*a*). Wherefore they reſolved the jury accordingly, without inquiring of the fraud; and they found for the plaintiff. *Vide* 4. *Hen.* 6. *pl.* 7. 17. *Aſſ. pl.* 2. 5. *Eliz. Dyer*, 219.

Co. 8. 171. a. Cro. Car. 174. 181. 2. Strange, 751. 1. Bl. Rep. 67.

Ld. Ray. 244. 766. 849.

(*a*) See 29. Car. 2. c. 3. 5. Mod. 377. Salk. 320. Skin. 257. 2. Mod. 310. 2. Vent. 218. Bunb. 281. Andr. 308. Ante, 174. 181.

CASE 2.

The Dean and Chapter of Hereford *againſt* the Biſhop of Hereford and Ballard.

A grant by a dean and chapter of the next avoidance will not bind their ſucceſſors.

QUARE IMPEDIT. The caſe was, That the dean and chapter of *Hereford* granted the next avoidance of a church to

Ante, 407. 10. Co. 60. Cro. Car. 259. 5. Co. 15. a. 1. And. 244. 1. Mod. 304. 2. Mod. 56. 3. Bac. Abr. 353. 391.

Ballard

Ballard. Whether that were a good grant to bind the ſucceſſor by the 13. *Eliz.* c. 20. ? was the queſtion.—WALMSLEY and OWEN held, that it was not; for although it is not a thing whereof any profit can be made, nor any rent reſerved, yet it is an hereditament, whereof the ſtatute intends that no grant ſhall be made; and ſo it hath been adjudged in the caſe of the biſhop of *Litchfield.*—But ANDERSON *è contra.* For the ſtatute doth not intend to reſtrain them but for ſuch things which are for profit, and by reaſon whereof prejudice might accrue to the ſucceſſor, which cannot be in this caſe. Wherefore, &c.—BEAUMOND was abſent. *Et adjournatur.*

The DEAN and CHAPTER of HEREFORD *againſt* The BISHOP of HEREFORD and BALLARD.

Goodday *againſt* Michell.

CASE 3.

TRESPASS, *quare clauſum fregit*, and two gates and three perches *ſepium fregit.* The defendant juſtifies, for that the ſaid cloſe was within the pariſh of *Rudham*, and that all the pariſhioners there from time whereof, &c. had uſed to go over the ſaid cloſe upon their perambulation in *Rogation*-week; *et quia* the plaintiff *obſtruxit duas januas et tres particatas ſepium in viâ prædictâ*, the defendant, being one of the pariſhioners, *januas et tres particatas illas ſepium fregit, &c.* And it was thereupon demurred.—And after argument by the *Serjeants*, THE COURT reſolved for the plaintiff.—ANDERSON. It is not to be doubted, but that pariſhioners may well juſtify the going over any man's land in their perambulation, according to their uſage, and to abate all nuſances in their way; as *F. N. B.* 185. *B. and the Book of Entries*, 158. But whether the juſtification here, be good or not? was the queſtion. And he held it to be ill, for pariſhioners cannot preſcribe, neither in matter of eaſement nor intereſt, nor otherwiſe; but in matter of eaſement, as a way to the church, or common fountain, or otherwiſe, they ought to alledge cuſtom or uſage within the pariſh, as 7. *Edw.* 4. *pl.* 26. & 15. *Edw.* 4. *pl.* 29. are.

Pariſhioners cannot alledge a right by preſcription to abate nuſances and obſtructions to their perambulation in Rogation-Week. Ante, 180. Poſt. 362. S. C. Owen, 71. 1. Saund. 117. 1. Lev. 176. Co. Ent. 650. 1. Bro. Ent. 379. Foxall's Caſe, ante, 180.

Secondly, The plaintiff declares of the breaking of two gates, *et tres particat' ſepium.* The defendant makes title to a way; and becauſe the plaintiff made *duas januas et tres particat' ſepium* (and doth not ſay *prædictas*), the defendant *januas et ſepes illas fregit*; ſo he juſtifies the breaking of the gates and hedges in his bar mentioned; but he anſwers not to them, whereof the plaintiff declares.—And thereto agreed all THE JUSTICES, that this fault in the bar was incurable. For WALMSLEY ſaid, that he thereby doth not anſwer to that wherewith the plaintiff chargeth him. For it may be, that the plaintiff had erected four *januas et ſex particatas ſepium*, and the defendant hath broken all of them; whereof for two gates and three perches of the hedge he might juſtify for the cauſe alledged; and for the other two gates and three perches, &c. caſt down, he brought the action. So the defendant anſwers not to them, whereof the plaintiff complains; and he cannot refer it to thoſe mentioned in the declaration, but to the *januas et ſepes* mentioned in the bar.

The plea muſt preciſely anſwer the allegations in the declaration. Co. Lit. 303. 6. Mod. 33. 1. Salk. 324. 2. Salk. 682.

The bar is alſo ill for another cauſe, for that it is *et quia* the plaintiff *obſtruxit januas, &c.* whereas he ought to have averred preciſely *quòd obſtruxit*; for otherwiſe no iſſue can be taken. —Wherefore it was adjudged for the plaintiff.

Pleading by a "*quia*" adjudged bad. 1. Saund. 117. Dyer, 257.

Fitch

Case 4.

Fitch *against* Hockley.

When a copyholder surrenders to the use of his will, the estate remains in the copyholder and if he afterwards surrenders it to *A.* without making a will, the second surrender is good; but if he does not make a will, *quære* if the surrenderee shall take, or it shall descend to *his heir?* Ante, 148. 4. Co. 23. a. Cro. Jac. 376. 2. Leon. 102. 4. Bac. Abr. 299. Gilb. Ten. 211. Gilb. Uses, 36. 2. Wilf. 16. Dougl. 716. 1. T. Rep. 600. Ante, 361. Ante, 148. 407. Co. Lit. 112. a. Post. 878. Co. 4. 23.

TRESPASS. Upon demurrer upon evidence the case was, A copyholder in fee surrendered to the use of himself for life, remainder to *J.* his son for life, remainder to the use of his last will; and the admitance was *secundum formam sursum redditionis prædict'*. *J.* dies; the father afterwards surrenders it to the use of the defendant in fee, and dies without making any will. Whether this be a good surrender? was the question between the heir of the copyholder and the defendant.

HARRIS moved, That it was void to vest the fee in the defendant; for when the father surrendered to the use of himself for life, and after to the use of *J.* his son for life, and after to the use of his last will, the fee of the copyhold was in the lord; so as the father had but an authority to dispose it by his will, and not otherwise. And then when he makes not any will to dispose thereof, the law shall transfer it to the heir, and the surrender in the interim to the defendant is void.

WALMSLEY, *Justice*. The surrender to the defendant is good; for a copyholder may surrender parcel of his estate, and in such manner as pleaseth himself; and he who comes in by such a surrender, is in by the copyholder, and not by the lord. And when a copyholder surrenders to the use of one for life, or in tail, the residue shall be said to be in himself, and he shall be said to be the donor. But here he hath expressed an use to himself for life, remainder to *J.* his son for his life, and after to the use of his will; the which is as strong as if it had been to himself. And although he might have disposed it by his will, if he had not made that second surrender (*a*), yet by that surrender it passed to the defendant.

ANDERSON, *Chief Justice, accord.* And it is a feoffment at this day to the use of his will; for it is to the use of himself, because he might dispose of it by his act in his life-time; so he might here. *Sed adjournatur.*

(*a*) N. B. Copyholds will not pass by will without a surrender. 2. Bro. C. C. 64. but if surrendered, they will pass by a will not duly attested to pass lands. 2. Brown. Ch. Cas. 58.

Case 5.

Jeremy *against* Goochman.

A consideration alledged in the preter tense held bad. Post. 741. 885. 1. Roll. Ab. 11. Dyer, 272. Moor, 220. 643. 3. Lev. 366. Strange, 933.

ASSUMPSIT. And declares, That in consideration *quòd deliberasset et dedisset* to the defendant twenty sheep, he assumed to pay unto him five pounds at the time of his marriage; and alledgeth *in facto*, that he was married, &c. The issue was *non assumpsit*, and found for the plaintiff; and now moved in arrest of judgment, because it is for a consideration past; for it is in the preter tense *deliberasset*, and therefore no cause of action.—And of that opinion was THE WHOLE COURT; wherefore judgment was stayed.

Case 6.

Bright *against* Forth.

If a recovery be suffered of a manor which extends to a vill wherein there are demesnes, copyholds for life, and services; a grant of such copyhold made at a court held in that vill is void, although the lands in the vill were excepted in the recovery. Ante, 38. 103. 2. Com. Dig. 532. 2. Term Rep. 415.

REPLEVIN. The defendant made conusance as bailiff to *Margaret Countess of Derby* for *damage feasant*. Upon demurrer the case was, That HENRY *Earl of Derby* was seised of the manor of *Curry-Revel* (which extended into *Curry-Revel* and *Bradway* and into other villages; and in *Bradway* were divers copy-

copyholders for life), and ſuffered a recovery of the manor, excepting the land in *Bradway*; and afterwards that part which extended into *Bradway*, was conveyed to *the Counteſs of Derby*; and afterwards the Earl and Counteſs of *Derby* kept a court at *Bradway*, and the ſteward granted that copyhold, being a copyhold for life, to the plaintiff: and, Whether this were a good grant by copy, or not? was the queſtion. BRIGHT *againſt* FORTH.

GLANVILE. The grant is void, becauſe a manor cannot be ſevered. And although there be demeſnes, copyholds, and ſervices in *Bradway*, yet that cannot make it to be a manor; and then the grant of the copyhold is void, eſpecially being a copyhold for life: for there, when the eſtates of the tenants for life are determined, they cannot be granted again when the manor is diſmembered: but of copyholds of inheritance, it may peradventure be otherwiſe; for it remains a manor, and a court ſhall be kept as to them. And this diverſity was agreed in *Sir Chriſtopher Hatton the Lord Chancellor's Caſe*. And ſo was *the Caſe of Meredith* for a copyhold in *Stokingham*, where there were copyholds of inheritance. And this very caſe was here, 29. *Eliz.* where a *feme* was endowed of divers copyholds for life, ſo as they became ſevered from the manor; and ſhe granted copyholds: and adjudged void.

WILLIAMS *è contra*. For being averred, that there are demeſne, copyholds, and ſervices in *Bradway*, it ſhall remain a manor at leaſt-wiſe to grant thoſe copyholds. *Vide* 26. *Hen.* 8. *pl.* 4. 33. *Hen.* 8. *Br.* 1. *Hen.* 5. *pl.* 11.

And afterwards being moved, ALL THE JUSTICES reſolved, that the grant was void, in regard there was not any ſuch manor of *Bradway* before, nor now. And ANDERSON ſaid, If this ſeverance had been of copyholds of inheritance, that the copyholders and their heirs ſhould have had it; but it can never be ſurrendered, for ſurrenders are by cuſtom, and therefore they ought to be in the court of the manor; and a ſurrender to the lord himſelf in his houſe, or out of court, is not good: *quod* BEAUMOND *conceſſit* (*a*): wherefore it was adjudged accordingly for the avowant.—And here a caſe was remembered, which was adjudged in the queen's bench, in this very point, that this was a good copy, 4. *Co.* 26. a. But it was thereto anſwered, that it was a ſtrange judgment, and never was entered by the direction of the Court; and a writ of error was brought thereupon in the exchequer-chamber; and the opinion of THE JUSTICES there was, that it was erroneous. And thereupon the copyholder compounded, and took only his corn, and relinquiſhed the title (*b*).

(*a*) Ante, 103. Co. Lit. 59. 9. Co. 75. 1. Ro. Ab. 500. 2. Vezey, 302. Ld. Ray. 76. 656. Gilb. Ten. 251. 257.

(*b*) Melwich v. Luther. ante, p. 103. Caſe 10.

Lewen *againſt* Dodd. CASE 7.

DEBT. The caſe was, That one ſeiſed of a houſe in *London*, let it for years rendering rent, and afterwards deviſed it to his "two ſons *equally*, and to their heirs." The one dies: Whether it ſhall ſurvive to the other and his heirs? was the queſtion. —DREW argued, that it ſhould not; for they are by thoſe words tenants in common, and not jointenants; for to that intent the deviſor put in that word "*equally*;" and 30. *Hen.* 8. "*Deviſe*," 29. A deviſe to "*his two ſons* "*equally, and* "*to their heirs.*" This creates a tenancy in common; and if one of the deviſees die, his portion ſhall go to his heir. Vide poſt. 695. Co. Lit. 190. b. *in notis*. 2. Sid. 53. 3. Com. Dig. 34. 3. Levinz, 373. 1. Salk. 227. 3. Atkins, 731. 2. Vez. 252. 1. Wilſ. 341. 165. Say. 67. 1. Peer. Will. 19. 2. Peer. Wilſ. 280. 3. Brown P. C. 297. 4. Brownl. P. C. 224. 12. Mod. 296. Ld. Ray. 622. Cowp. 237. 352. 657.

Lewen against Dodd.

deviſe to two *et hæredibus eorum*, the one dies, his part ſhall not ſurvive, but his heir ſhall have it; for ſo was the intent of the deviſor: *à multò fortiori* in this caſe, where it is limited to them *equally* betwixt them, and their heirs after them. And in *Paſch.* 18. *Eliz.* is a precedent in the court of wards, in one *Shepherd's Caſe*, where he made a deviſe in this manner: "ITEM, "I will that my lands called *Earth-pits* ſhall *equally* remain to "*Joan* and *Mary* my two daughters, and the heirs of their two "bodies." And by the opinion of MANWOOD and DYER, it was reſolved, that they were tenants in common, and that the ſurviving daughter ſhould not have her ſiſter's part for her life.

ANDERSON. There is an equality in eſtate, in condition, in taking of the profits; and all this is here. And if it had been *æquis portionibus*, I ſhould doubt, whether they would be tenants in common; but as it is, they are jointenants. But if the words had been to them *equally*, and to their heirs *equally*, that would make a tenancy in common; but here *equally* is annexed to the eſtate, and they being jointenants, have one equal eſtate; and the book vouched in 30. *Hen.* 8. hath been oftentimes over-ruled to be no law.—OWEN. A deviſe ought to be taken according to the intent of the deviſor; and the intent here was, not to give all to the one by the ſurvivorſhip, but an equal advancement, and that their heirs ſhould have an equal advantage. If we ſhould conſtrue it, that they ſhould be jointenants, they would not have it ſo; and the word "*equally*" is vain and idle; and a deviſe to them "equally," and to be "equally divided between them," is all one.—WALMSLEY. The intent in the deviſe ſhall be collected upon the words: and when the intent is ambiguous upon them, it is a ſure way to follow the courſe of the common law. And it may be he put this word "equally" in his will, to ſhew his intent, that the one ſon ſhould have it as well as the other: and that may be ſatisfied, if they take as jointenants, for they ſhall have equal portions and equal poſſibilities of ſurvivorſhip; and the caſe of 30. *Hen.* 8. before vouched was never taken for law. And I have demanded the opinion of divers other Juſtices of our houſe; and they held, that they were jointenants; and the word "equally" is not of any effect, but to ſhew his intent, that they ſhould have an equality in their eſtates, and in the perception of the profits; which intent is ſatisfied, if they be jointenants. And in 17. *Eliz.* was a caſe in this court, where a deviſe was to two, part and part like; and the Court was divided in opinion, whether they were jointenants or tenants in common. But LORD DYER held them to be jointenants. And it is not a ſafe courſe to ſearch the intent, unleſs we be certain of the intent. And as to the caſe vouched in the court of wards, it may be that they were tenants in common of the freehold there, becauſe the inheritance is ſeveral.—BEAUMOND. If the deviſe had been "to them, and "their heirs equally," it is clear, that they ſhould be tenants in common: ſo he conceived it to be all one here, otherwiſe the word "equally" ſhould be void. For the conſtruction that "equally" ſhall refer to the eſtate and perception of the profits, would have been good without this word "equally." And the words being "equally to them, *and* to their heirs," this copulative conjoins "equally" to the heirs, as well as to them; and they be of ſuch ſenſe as a deviſe "to them equally, and to their heirs

Br. Dev. 29.

Ante, 330.

"equally" in which case they cannot be jointenants. And in the queen's bench it hath been agreed, where the words were "equally "to be divided," that they should be tenants in common. And I have spoken with the Justices of our house, and they incline to this opinion. Whereupon it was adjourned (*a*).

Lewen *against* Dodd.

(*a*) Adjudged to be but a tenancy in common; and the judgment affirmed on a writ of error by *four* Judges against *three*, post. 696.

Upton *against* Basset.

Case 8.

TRESPASS. Upon demurrer the case was, That the plaintiff and defendant claimed by several leases from one and the same person. The plaintiff in his replication avers, that the defendant's lease was made upon fraud; but shews not any fine by himself paid for his lease, nor any rent reserved thereupon, nor any other valuable consideration wherefore it was made. Whereupon the defendant demurred thereto.—Yelverton. At the common law, there was not any fraud remedied, which should defeat an after purchase, but that only which was committed to defraud a former interest: *quod fuit concessum per* Curiam. And the statute of 27. *Eliz.* c. 4. did not remedy it; for there is not any money or consideration paid for this second lease, no more than for the first; and therefore not aided by that statute. —Lewknor *e contra*. For every one who obtains any thing or estate by his own act, is a purchasor, and so within the words of the statute. The plaintiff hath also averred, that it was made by fraud to deceive him, which is confessed by the demurrer. Wherefore, &c.—Anderson. The confessing the fraud is not material, forasmuch as the plaintiff is not such a person as ought to have benefit thereof, and within the remedy and provision of the statute. It is clear, a fraudulent conveyance is not made void against all, by that statute, but only against those who afterwards come to the land upon good consideration; for so are the words, and so was the intent of the statute: and therefore if a man who hath not good government of himself, makes a conveyance by advice of his friends of his lands upon trust, and without any consideration, and afterwards one procures him, for five hundred pounds, or other petty consideration, to sell unto him land worth five hundred pounds *per annum*; although this last purchasor pays money, yet he shall not avoid the first conveyance; for the statute was made to help those who came to land upon good consideration lawfully, and not without consideration, or by any indirect means: and this case hath been resolved.—Walmsley *accord*. For it is not void against all; no more than if a fraudulent gift be of goods, it is not fraud by the 13. *Eliz.* c. 5. against all, but only against his creditor, but remains good against the *donor* himself (*a*). —Beaumond. This is not void against all, as a feoffment upon maintenance or champerty is not void against the feoffor, but against him who hath right. And I was privy to a case which was resolved by the two Chief Justices and three other Justices, *viz.* One made a lease for eighty years without consideration, and afterwards conveyed the land to his wife for a jointure after marriage. And they resolved, because this last conveyance was voluntary without valuable consideration, that the wife could not avoid the former lease, by averring that it was fraudulent.—Owen accorded with

If a man makes a lease *by fraud*, and afterwards makes another lease *bona fide*, the second lessee shall not avoid the first lease.
Cro. Jac. 180. 454.
3. Co. 83.
Moor, 615. 618.
3. Keb. 526. 751.
W. Jones, 411.
T. Jones, 94.
1. Vent. 257.
6. Co. 72.
Bridg. 23.
Lane, 22. S. C. 45.
2. Lev. 147.
1. Vern. 285. 85.
1. Lev. 150.
Hard. 305.
2. Roll. Rep. 305.
2. Vez. 645.
Bul. N. P. 108.
3. Wilf. 356.
1. Burr. 396.
2. Com. Dig. 579.
Powel on Powers, 336.
Cowp. 280. 705.
2. Bl. Com. 296.

(*a*) Dyer, 295.
6. Co. 72.
3. Co. 80.
Yelv. 196.
Cro. Jac. 271.

UPTON *againſt* BASSAT.

with them *in omnibus*; and ſaid, that he was at the making of this ſtatute, wherein ſpecial care was taken, that there ſhould not be any words which ſhould extend to purchaſors, but ſuch as paid money, or other good conſideration for their purchaſe. Wherefore it was adjudged for the defendant. *V.* 3. *Co.* 83.

CASE 9.

Auſtye *againſt* Fawkener.

If iſſue be taken upon a bad preſcription, it is aided, after verdict, by the ſtatutes of *jeofail*. Ante, 227. 259. Poſt. 778. (458.)

Yelv. 74. Cro. Jac. 312. 5. Co. 43. a. Hob. 113. 1. Com. Dig. 331. 2. Wilſ. 260. 1. Salk. 336. Ante, 180. Poſt. 455.

REPLEVIN. The defendant avows for *damage feaſant*. The plaintiff juſtifies, for that he had a cloſe adjoining to the defendant's cloſe; and that the defendant and all the occupiers of the ſaid cloſe from time whereof, &c. had uſed to repair the fences between the cloſes; and for not ſufficient incloſing, his beaſts entered, &c. Iſſue was taken upon the preſcription, and found for the avowant; and now moved in arreſt of judgment, that the preſcription, "that *every* occupier," &c. is too general; for tenant at will, or at ſufferance, or a diſſeiſor, are occupiers.—WALMSLEY. True it is, the preſcription is not good: for this incloſure is a charge upon the land; and they who are only occupiers, as a diſſeiſor, tenant at will, or ſufferance, cannot charge the land therewith: but it ought to have been, that he and all they whoſe eſtate, &c. But ſuch a preſcription to pay ſo much in diſcharge of tithes by the occupiers of lands, hath been allowed to be good; for that goes in diſcharge, and for the benefit of the land, and tithes ariſe upon the occupying the land. But yet in regard that iſſue is taken upon this preſcription, and a verdict hath found it, this is not any cauſe for ſtaying judgment, but it is aided by the ſtatute of *jeofails* (*a*).—And thereto THE OTHER JUSTICES agreed, *viz.* that the preſcription was not good, and that it was helped by the ſaid ſtatute. Wherefore, &c.

(*a*) See 32. Hen. 8. c. 30. and 4. & 5. Ann c. 16.

CASE 10.

Gryſman *againſt* Lewes, Parſon of Kingſland.

Payment of one ſpecies of tithe is not diſcharged by paying a *modus* for another. Ante, 363. Poſt. 475. 786.

Moor, 446 911. 2. Lut. 1052. 2. Inſt. 652. 1. Mod. 229. Carth. 461. Salk. 657. 2. Bl Com. 30. Ld. Ray. 130. 242. 252. 2. Ld. Ray. 1162. 5. Bac. Abr. 83. 2. Peer. Will. 572. Wood. Inſt. 172. 3. Salk. 657.

PROHIBITION. For ſuing for tithes of cows, ſteers, oxen, horſes, &c. Wherein he ſurmiſed a cuſtom, that every pariſhioner ſhould pay for every milch cow one penny by the year, and for every other cow an half-penny *per annum*, in recompence and diſcharge of all tithes of cows, oxen, ſteers, and calves; and alſo a penny for every mare, in diſcharge of all tithes of all horſes, mares, and colts there. And it was thereupon demurred, and conſultation prayed. For tithes paid for one thing, cannot be intended a recompence for tithes of another thing, where tithes are reſponſible for both in kind: and therefore it was adjudged in *Sir Charles Morriſon's Caſe*, where one preſcribed to pay the tenth part of corn in the ſheaf, for the tithes of all which is in the ſheaf, and of all which is raked; and adjudged to be a void preſcription, becauſe he is to pay tithes of both of them. It is alſo unreaſonable; for then he may put the leſſer part in ſheafs, and leave the greater part to be raked. And the opinion of *Fitz. N. B.* 53. *G.* that tithes ſhall not be paid for the agiſtment of cattle, is no law.—And of that opinion was THE WHOLE COURT, that this preſcription is not good to be diſcharged of one tithe by the payment of another: for he ought to pay ſomewhat for

for the tithe of every thing which is due. And if tithes ſhould not be paid for the agiſtment of cattle, he might employ all his land in feeding of barren cattle, and ſo defraud the parſon of his tithes. And a ſpecial conſultation was afterwards awarded *dummodo non agatur de decimis*, for milch-kine, draught oxen, or beaſts agiſted for proviſion for his houſe. *Godolphin's Rep.* 384.

GRYSMAN *againſt* LEWIS.

Jennings *againſt* Bragg.

CASE 11.

EJECTIONE FIRMÆ. Upon a ſpecial verdict the caſe was, That a diſſeiſee made a leaſe for years, and delivered it as an eſcrow to a ſtranger, commanding him to enter into the land, and then to deliver it as his deed, who did it accordingly: and, Whether this was a good leaſe or not? was the queſtion. And it was moved, that it was not; for when it is delivered as an eſcrow, and afterwards is delivered upon the land as the deed of the diſſeiſee, that hath relation to the time of the delivering it as an eſcrow to be his deed; at which time he had but a right to the land, and his leaſe was not good. As if an infant or *feme covert* ſhould deliver a deed as an eſcrow, and it is delivered after full age, or when ſhe is ſole, yet it is void; for it hath relation to the firſt delivery; ſo *è converſo*, where a *feme ſole* delivers a deed as an eſcrow, &c.— And this caſe was agreed by THE COURT, becauſe it was delivered by authority before, when ſhe was *ſole*: ſo it is of a deed of feoffment, and letter of attorney, therein to make livery by a man of *ſane memory*, which is delivered by the attorney, when he is *non compos mentis*; yet it is good, becauſe it hath relation to the authority before.—But ANDERSON ſaid, it was a good leaſe in this caſe; for it was not his deed until the ſecond delivery, at which time he had good right and power to let it. Wherefore, &c.—*Sed adjournatur.* 3. *Co.* 35.

A *diſſeiſee* out of poſſeſſion makes a leaſe for years, and delivers it as an eſcrow to a ſtranger, who delivers it upon the land as the deed of the leſſor. *Qu.* If this is a good leaſe? Poſt. 483. Co. Lit. 48. 3. Co. 35. 55. 2. Bendl. 81. 2. Ro. Abr. 25. 3. Com. Dig. 328. 3. Bac. Ab. 400. 1. Wood's Con. 14. 651. 725. 725. Shep. Touch. 70.

Belford *againſt* Foord.

CASE 12.

TRESPASS. The caſe was, A prebend of *Sarum* made a leaſe for ſeventy years, and the dean and chapter confirm *conceſſionem prædict'* for fifty-one years, *et non ultra*; the fifty-one years are now expired: and, Whether this were now a good leaſe againſt the ſucceſſor? was the queſtion.—GLANVILE moved, that it was good; for the term is a thing entire, and therefore cannot be apportioned by their confirmation. And here they confirm *dimiſſionem prædictam*, which is the whole term, which ſhall not be controlled by the ſubſequent words. This confirmation alſo is but a conſent, and therefore cannot be given conditionally, or in any other manner than the thing itſelf whereto it is annexed, is given. And the difference is betwixt a conſent and an intereſt; for he that hath an intereſt, may thereto annex a condition or limitation. And if the prebend's ſucceſſor be to bring his action of waſte, he ought to count upon a leaſe for ſeventy years, and that they had aſſented thereto: and 7. *Hen.* 4. is, that aſſent before the grant is ſufficient.—ANDERSON. If the leſſor is to bring waſte, he ſhall count of a leaſe for ſeventy years. But after his death, if the ſucceſſor brings waſte, he ſhall ſhew the confirmation and eſpecial matter.—WALMSLEY. The leaſe is made good for all the years; for all the right and intereſt remained in the prebend, and the dean and chapter have only a conſent, which cannot

A prebend makes a leaſe for 70 years. The dean and chapter confirm *the ſaid demiſe* for 51 years *and no more*. This is a confirmation of the whole term of ſeventy years. Poſt. 472*. 5. Co. 81. a. Dyer, 52. 338. Moor, 471. 481. Co. Lit. 300. Bendl. 238. 1. And. 47. Hetl. 75. 3. Bac. Ab. 384.

BELFORD *againſt* FOORD.

not be apportioned; but they ought to aſſent to all, or to no part; for their conſent goes only to the action, which is to the making of the leaſe; and not to the thing acted, which is the intereſt of the leaſe: then when they conſented to the making of the leaſe, they had done all which they could do, and had nothing to do with the leaſe itſelf. But ANDERSON and THE OTHER JUSTICES held ſtrongly, that the leaſe was not good but for fifty-one years only; for they at their election might confirm for all or for part, and the confirmation ſhall not be taken larger than they have made it: but if they confirmed the demiſe, and not ſhewn for what time, it ſhould be the entire term. But when they ſay for fifty-one years, *et non ultra*, that very well qualifies what is precedent, and it ſhall not be conſtrued larger, &c. Wherefore, &c.—*Et adjournatur* (*a*).

(*a*) It was argued again, and adjudged that the confirmation went to all, poſt. 472*.

CASE 13.

Parker *againſt* Parker.

How an award is to be delivered.

DEBT upon an obligation, conditioned to ſtand to the arbitration of *J. S.* ſo as it be delivered to *either* of the parties before *Michaelmas*. The defendant pleads, that no part of the arbitrament was delivered unto him before *Michaelmas*. And it was thereupon demurred; becauſe if it were delivered to any of them, it ſufficed.—But ALL THE JUSTICES (ANDERSON *abſente*) held, that one part of the arbitrament ought to be delivered to each party, ſo as he might take notice thereof; and this word *either* ſhall be expounded as *every*.—But when ANDERSON came in court, being moved unto him, he doubted thereof: and the matter was referred again to arbitration (*a*).

(*a*) Poſtea, 797. It muſt be delivered to each. *L. C. B.* PARKER's *MSS.*

CASE 14.

Wormleighton *againſt* Burton.

Trinity Term, 37. *Eliz. Roll* 2838.

Juriſdiction of the court leet. 2. Hawk. P. C. 113, 114.

REPLEVIN. The defendant made conuſance as bailiff to *Sir Fulk Greville*, for that he had a leet within his manor of *D.* and that at ſuch a court the plaintiff was amerced for putting his geeſe upon the common there; and for that amercement diſtrained.—And becauſe it was not ſhewn that the common was within the leet; as alſo, becauſe THE COURT held, that it was not any article inquirable in a leet, nor puniſhable there; it was adjudged without argument for the plaintiff.

CASE 15.

Worſley and his Son *againſt* Charnock.

To an *audita querela* by two; if outlawry of one be pleaded, the other ſhall have ſummons and ſeverance. Poſt. 472. 549. 635. 892.

6. Co. 25. b. 10. Co. 135. a. Cro. Jac. 425.

AUDITA QUERELA, to avoid an execution upon a ſtatute, where outlawry in one of the plaintiffs was pleaded. And thereupon a demurrer in law, whether it might be pleaded in that ſuit, which is only to be diſcharged, and not to recover any matter. But it was ruled to be a good plea; whereupon the other plaintiff prayed *ſummons and ſeverance*, ſo that he only might ſue.—And ALL THE JUSTICES, except WALMSLEY, held, that he might well have it, for that in this caſe they only ſue to be diſcharged: wherefore the nonſuit of the one ſhall not prejudice the other. It is alſo to diſcharge their land; in which caſe it is not reaſonable that an act of the one ſhould make the other man's land to be charged.—But WALMSLEY doubted thereof: and therefore it was adjourned. *Vide* 34. *Hen.* 6. 31.

Hart

Hart *againſt* Brewer and Hariſon.

CASE 16.

Trinity Term, 36. or 37. Eliz. Roll 2042.

EJECTIONE FIRMÆ. It was found by a ſpecial verdict, That one *Herſt*, 26. *Hen.* 6. deviſed two houſes in *Walbrook* in *London* (being the houſes now in queſtion) to the churchwardens of *St. Stephen's* to theſe uſes. Firſt, To find an *obit*, and to beſtow three ſhillings and four pence annually upon an *obit* in the church of *St. Stephen's*. Secondly, To repair the ſame houſes. Thirdly, To beſtow the reſidue of the profits about reparations of the ſame church of *St. Stephen's*, and to provide ornaments in the ſame church. But the deviſe was conditional, that if they failed in finding the *obit*, that then the eſtate ſhould ceaſe, and the land ſhould be to the mayor and commonalty of *London*; and that they ſhould find that *obit*, and repair the tenements, and beſtow the reſidue of the profits upon *London-bridge*. And they found the ſtatute of 1. *Edw.* 6. c. 14.; and that the *obit* was well maintained within five years before the ſtatute, and derived title to the defendant under the queen; and the ſucceſſors of the churchwardens made a leaſe to the plaintiff: and, Whether theſe houſes were given to the queen? was the queſtion.—DANIEL moved, that they were; for the *obit* is the principal thing why the houſes were deviſed: and the reparation of the houſes and church are but acceſſaries, without which the *obit* could not be maintained; but if it had been to make the reparation, or for the ornaments of another church, it had been otherwiſe. Wherefore, &c.—But ALL THE JUSTICES held *è contra*, and for the plaintiff, that the *queen* ſhould have no more but that which was appointed for the maintenance of the *obit*; and that ſhe ſhould not have that which was given for the other uſe of reparation and finding ornaments; for although the *obit* is appointed to be in the church, yet the church is for divers other good purpoſes; and for thoſe good uſes the church ought to be repaired, and to have ornaments. And the letter of the ſtatute is plain, that the king ſhall have that only which is given to ſuperſtitious uſes. And WALMSLEY ſaid, that the caſe of the town of *Wakefield*, where houſe and lands were given to give part of the profits to a prieſt to ſay maſs, and other part of the profits for the reparation of the ſaid houſe, and other part of the profits to repair certain bridges, it was adjudged that the queen ſhould have all but what was given for the reparation of the bridges. And BEAUMOND ſaid, that he was of counſel in a caſe in the queen's bench, where land was given to find a prieſt to ſay maſs, and alſo to give part to the poor; and becauſe the part to be given to the poor was incertain, the queen had all: but there is an expreſs difference by the letter of the ſtatute between land given for the maintenance of an *obit*, and land given for the maintenance of a prieſt. Wherefore it was adjudged for the plaintiff.

If houſes be deviſed, and a *certain* part of their value appropriated for the purpoſe of finding an *obit*, and another part for the reparation and ornament of the church, that part only is forfeited which is given to the ſuperſtitious uſe.

1. Co. 23. 4. Co. 111, 112. Hob. 124. Duke, 107. Moor, 165. 2. Ro. Rep. 206. Cro. C. f. 249. Co. Lit. 342. Dyer, 337. Latch. 38.

Scot *againſt* Sir Anth. Mayn.

CASE 17.

DEBT upon an obligation, conditioned for the performance of covenant in an indenture, wherein *Mayn* the defendant had let to the plaintiff certain land for twenty-one years, and cove-

If a leſſor covenants to make a new leaſe upon ſurrender of the old one, and diſables himſelf by levying a fine, the condition is broken, though the leſſee does not offer to ſurrender. Poſt. 479.—2. And. 18 S. C. 5. Co. 20. b. Jones, 314. Moor, 452. Poph. 109. Bulſt. 22. 1. Bac. Abr. 418. 3. Bac. Abr. 713. 2. Bl. Rep. 1150. Dougl. 50.

Scot *againſt* Sir Anth. Mayn.

nanted with him, that upon the ſurrender of that leaſe at any time during his leaſe, he would make him a new leaſe for ſo many years, &c. The defendant pleaded, that the plaintiff had not ſurrendered unto him, &c. The plaintiff ſhews, that the defendant had levied a fine of thoſe lands *ſur conuſance de droit come ceo*, &c. to *Sir John Savage*. And it was thereupon demurred; becauſe he doth not aver, that he offered to make him a ſurrender, although he were not able to accept thereof, nor to make a new leaſe.—But ALL THE COURT held, that there needed not any tender to be made of the ſurrender, when he hath diſabled himſelf to accept thereof by his own act, or to make a new leaſe. Wherefore it was adjudged for the plaintiff. And error was afterwards brought thereupon, and the judgment affirmed.

See 8. & 9. Will. 3. c. 11. ſ. 8.

Case 18.

Buckler *againſt* Harvy.

A. being tenant for life, makes a leaſe for years to *B.* and then grants the reverſion for his own life to *C.* *habendum* from *Midſummer next enſuing*. The grant is void, though the leſſee attorns after its commencement; and if *C.* after the expiration of the term, enters under this grant, and *A.* levies a fine to him, it is a forfeiture of the eſtate for life, for which the remainderman may enter 1 Roll. 525. S. C. 2. Co. 55. Moor, 423. 2. And. 29. Co. Lit. 252. 217. 10. Vin. 378. Hob. 170. 175. 5. Co. 94. Roll. Rep. 261. Dyer, 214. 2. Vent. 204. 3. Co. 21. a. Cro. Jac. 660. 1. Salk. 246. 3. Com. Dig. 229. 259. 2. Bac. Abr. 487. 496.

EJECTIONE FIRMÆ. Upon a ſpecial verdict the caſe was, Tenant for life, remainder to *A Buckler* in tail. Tenant for life, 4th *March*, 20. *Eliz.* makes a leaſe for four years; and afterwards 11th *April*, 20. *Eliz.* grants the reverſion *habendum tenementa prædicta*, from *Midſummer* next enſuing, for the life of the grantor: after *Midſummer* the leſſee for years attorns; the term afterwards expires; the grantee enters; the grantor levies a fine unto him *ſur conuſance de droit come ceo*, &c.; the tenant in tail in remainder enters for the forfeiture, and lets it to the plaintiff, upon whom the defendant, being the grantee in reverſion, re-enters, the firſt tenant for life being yet alive. *Et ſi*, &c.

The firſt queſtion was, Whether by this grant of the reverſion *habendum* after *Midſummer*, and the attornment made after *Midſummer*, the grant be good or void?

Secondly, Admitting it to be void, If when the grantee enters, and he being in by diſſeiſin, the tenant for life levies a fine to him *ſur conuſance de droit come ceo*, &c. whether this be a forfeiture of his eſtate or not?

It was argued by HEALE, *for the plaintiff*, and by HARRIS, *for the defendant*.

WALMSLEY, *Juſtice*. A grant of a reverſion, *habendum* after the death of the tenant for life, is good; for ſo is the courſe in fines; for this limitation is as to the having the poſſeſſion, and not as to the having the reverſion, for that is in the grantee preſently; but when a reverſion is granted *habendum* after a day future, he is thereby excluded to have the reverſion until that time, and therefore it is utterly void; and the *habendum* ſhall not be void, but where it is not requiſite, as in releaſe of a right, or grant of a term; but here the *habendum* is neceſſary to ſhew the eſtate: but as to the forfeiture I make ſome doubt; for I know not how there can be a forfeiture to him who hath not any reverſion; for by the entry of the grantee, it is diſſeiſin; and all remainders and reverſions are taken from the parties in whom they were. And, How can one forfeit an eſtate which he hath not? as here he hath not who levied the fine. And it hath been held in this court, by LORD DYER and others, that if he in remainder for life levies a fine *ſur conuſance de droit come ceo*, &c. that it is not any forfeiture;

1. Wood's Con. 81. 501. 578.

for

for it is but as a releaſe: and therefore 10. *Edw.* 4. rent cannot be reſerved upon ſuch a fine; and there is not any book that it ſhould be a forfeiture. BUCKLER *againſt* HARVY.

ANDERSON, *Chief Juſtice.* It is clear that it is a forfeiture; and it is not by reaſon of any eſtoppel, but by reaſon of the prejudice to him in reverſion: and although the tenant for life hath but a right, yet when he hath levied a fine, he in the remainder might enter preſently for the forfeiture upon the diſſeiſor; but if he had releaſed by fine, there ſhould not be any forfeiture, but by that fine levied every one ſhould be concluded, but that he gave a fee by the fine; and it is not material, although that he in remainder be a ſtranger thereto: as if a ſtranger brings waſte againſt tenant for life, and he pleads *nul waſte fait*; or if tenant for life prays in aid of a ſtranger, he in remainder is a ſtranger to theſe records; yet he ſhall take advantage in regard of the prejudice to the reverſion. For the firſt point I doubt; but I conceive the grant to be void; and that he by his entry is a diſſeiſor. Co. Lit. 252. a.

BEAUMOND, *Juſtice.* The grant is void: for if the eſtate had paſſed by the livery, it had been clearly void; and the ſame law is here; for the *habendum* is not void otherwiſe: but in regard that no eſtate is limited in the premiſes; and becauſe the *habendum* limits the eſtate, and all the eſtates depend upon that which is void, and the grant being void, the grantee by his entry is a diſſeiſor; and yet there ſhall be a forfeiture of the tenant for life, in regard he preſumed to give a greater eſtate than he had. Wherefore, &c.

OWEN, *Juſtice*, was abſent in the dutchy chamber, and it was there adjourned.—But afterwards. *Paſch.* 38. *Eliz.* upon theſe reaſons it was adjudged to be a forfeiture, and the entry of him in reverſion to be lawful (*a*).

(*a*) This caſe was argued in the queen's bench, upon another ſpecial verdict, and the Judges there were of the ſame opinion. Poſt. 586.

Wentworth *againſt* Wentworth. CASE 19.

DOWER. The tenant pleads, that he by deed indented granted a rent out of that land to the demandant in recompence of her dower, which ſhe accepted, &c. The demandant by replication confeſſes the grant of the rent and her acceptance; but that in the ſame indenture there was a condition, that if the rent ſhould not be paid within a month, &c. that the rent ſhould ceaſe, and the deed ſhould be void; and ſaith that the rent was not paid. Thereupon the tenant demurred.—GLANVILLE, *for the tenant*, argued, that the demandant ſhould be barred; for dower is of common right, and may be aſſigned in lands, or in rent out of the lands; and the condition annexed to that aſſignment is void; for ſhe is in *paramount*; as 2 *Edw.* 4. Executor delivers a legacy upon condition, the condition is void. It is not ſhewn alſo that ſhe demanded the rent; and then the condition is not broken.—DREW *e contra.* The condition is well annexed to the grant, and therefore it is not any bar to her dower; for it is not abſolutely, but conditionally aſſigned; and recompence of dower ought to be as abſolute and beneficial as dower itſelf; and it is not like to a jointure aſſured

A grant of a rent with condition that it ſhould ceaſe, and the indenture be void, on non-payment at the day, is not good in ſatisfaction of dower; but if the demandant has accepted it, and the condition be broken, ſhe ſhall be reſtored to her writ of dower, although ſhe has pleaded the indenture as a *grant*, and not as an *aſſignment*. Co. Lit. 34. b.

Poſt. 642.—Dyer, 361. Noy, 55. 1. Roll. Abr. 684.

WENTWORTH *againſt* WENTWORTH. Co. 4. 2. b.

aſſured upon a condition (as *Vernon's Caſe* is), which may well be, becauſe the ſtatute makes it a bar if ſhe accept thereof: here alſo needeth not any demand; becauſe ſhe is not to defeat an eſtate thereby, nor is the non-payment thereof penal.—WALMSLEY. As this caſe is pleaded, there is not any aſſignment of the rent for the dower; and therefore it is not any bar of dower; for it is pleaded, *quòd dedit et conceſſit unum annualem redditum, &c.*; and although *dedit et conceſſit* are good words in the deed, yet when the tenant is to plead it, he is to plead it in apt words, *viz. quòd aſſignavit*; for a gift of rent or land is no bar to dower: and to that purpoſe I have ſeen a caſe in the years of *Edw.* 2. in the book at large, where it was pleaded, that the ſon granted land in dower to his *feme ex aſſenſu patris*: and ruled that it was not good; for it ought to have been *aſſignavit*; for in pleading every one ought to plead according to law: and as it is here pleaded, the *feme* may have a writ of annuity upon this grant, which ſhe cannot have if it were an aſſignment; and the words of the deed being *dedit, &c.* the intent of the parties to have it a grant doth thereby appear; as alſo by annexing a condition thereto; for it is clear that a condition cannot be annexed to an aſſignment of dower; and the tenant againſt whom it is hath pleaded it as a grant; and if he hath election to uſe it as he will (as in many caſes a man ſhall have), yet he hath here made his election to have it as a grant; and we may not take it otherwiſe: and as to the demand, it needed not, when ſhe is not to deſtroy the eſtate; for the condition being, that if the rent be not paid, it ſhall be void, it is penal to the heir, for then ſhe ſhall be reſtored to her dower; and therefore the heir ſhall do the firſt act by his tender, and therefore it was adjudged in a caſe wherein I was of counſel in this court: a deviſe made of a rent out of land to one, and a deviſe of the land itſelf to another upon condition to pay the rent, the deviſee of the land ought to pay the rent without demand in ſalvation of his land.—BEAUMOND *accord.* I agree that an aſſignment of land for dower, or of rent for dower, ought to be abſolute; for the rent comes in place thereof, and ſhall be of the ſame nature; and the annexing of a condition to the aſſignment of dower is void: but here is not any aſſignment, but it is a mere grant; and there needs not any demand, becauſe the *feme* is not to defeat any eſtate by the non-payment. Wherefore, &c.—OWEN. The pleading *quòd dedit et conceſſit* is good in ſubſtance, but not in form; for it ought to have been pleaded *aſſignavit*: but although he hath not done ſo, it is good in law; for a gift in recompence of her dower is an aſſignment; and although it be good in form, yet it is not material, for that the other hath not demurred for this cauſe; but for the condition it is void, for the reaſons before alledged: but if it had been good, it ought to have been demanded; for upon the non-payment the *feme* is to take the land from the heir, for ſhe ſhall be reſtored to her writ of dower. Wherefore, &c.—But WALMSLEY and BEAUMOND continued their former opinion, for it is not form but ſubſtance; for the deed ſhall not be taken in any other manner than as he pleads it, which is not any aſſignment: the condition alſo is not annexed to the land, but to the grant; and for the condition broken ſhe is not to have the land, but only to be reſtored to her action to demand her dower; wherefore there needed not any demand.—ANDERSON

Harg. Co. Lit. 34. b. note (11). See Pearſon v. Pearſon, 1. Brown's Ch. Caſes, 292.

was

was abſent, and it was therefore adjourned.—Afterwards, *Paſch.* 38. *Eliz.* it was moved again; and then it was adjudged accordingly for the demandant. WENTWORTH *againſt* WENTWORTH.

Baldwin *againſt* Smith.

CASE 20.

Trinity Term, 36. *Eliz. Roll* 1676.

REPLEVIN. The iſſue was, Whether the land was the freehold of one *Kent?* Upon ſpecial verdict it was found, that *Francis Archer* was ſeiſed of this land in fee holden in ſocage, and deviſed it to "*Robert Archer* his ſon for life, and after to the right "and next heir male of the ſaid *Robert*, and to the heirs males of "the body of ſuch a right and next heir male of *Robert*;" and found further, that at the time of this deviſe, *Robert* had iſſue *John* his eldeſt ſon. The deviſor died; *Robert* entered, and infeoffed *Kent* with warranty; *John* enters; *Kent* re-enters after *Robert*'s death; and *John* re-enters upon him, &c. *Et ſi* upon all this matter, the eſtate of *Kent* be lawful or not, and that *John* is to be barred? was the queſtion.

If a deviſe be made to "*A.* "*for life, and to* "*his right and* "NEXT HEIR "MALE, *and* "*the heirs male* "*of the body of* "*ſuch right and* "*next heir*," *A.* takes an eſtate for life, and the remainder over is *contingent*, though he has a ſon living at the time of the deviſe: if, therefore, *A.* enters and makes a feoffment in fee, the remainder is deſtroyed. Ante, 314.

Firſt, Whether this be an eſtate tail, or for life only, in *Robert?*

Secondly, Whether this warranty deſcending upon *John*, being an infant (as it was found he was), ſhall bind him, becauſe he could not enter during the life of his father?

Thirdly, The warranty deſcending, and the right of remainder veſting all at one time, Which of them ſhall be preferred?

DREW, *for the avowant*, moved, that it is an eſtate tail in *Robert*, becauſe the remainder is limited to his next heir male immediate; as in the caſe 39. *Aſſiſe*, deviſe to one *et uni hæredi de corpore, &c.* was taken to be an eſtate tail; the remainder alſo ſhould otherwiſe be in abeyance, which the law avoids: if it alſo were not an eſtate tail, it is void; for the remainder ſhall never be *in eſſe* during the particular eſtate.—But ALL THE JUSTICES, OWEN *abſente*, held, that *Robert* the father had but an eſtate for life; for ſo are the words plainly; and the right heir ſhall take it as a purchaſor.—BEAUMOND held, that *John* ſhall take it, and the remainder ſhall veſt in him preſently, living the father; for the remainder is limited "to the right and next heir of the father;" which words being in a will ſhall be taken according to the intent of the deviſor, *viz.* to him who was then heir-apparent; for he is, in the intention of a plain man, the right and next heir.—But ANDERSON and WALMSLEY againſt him in this point, and that this remainder ſhould be expectant: but it was admitted by them, that this remainder being depending upon an infant, is good enough.—ANDERSON held, that the warranty ſhould not bind; for a warranty ſhall not bind a right, but where he who ſhould be bound thereby had time to avoid it by his entry: and therefore it was adjudged in the queen's bench, where land was given to *baron* and *feme* for their lives, the remainder to the next heir male of the body of the *baron*, the remainder to the *baron* and *feme* in tail, the *baron* levied a fine with warranty, that the fine ſhould not bar the heir male, for he had not time to avoid it during the life of the *baron*.—WALMSLEY held, that this feoffment of itſelf deſtroys the remainder, ſo as it never ſhall come *in eſſe*; the warranty alſo deſtroys the remainder, and it is not like to a former right: and if the making of a collateral warranty be a *tort*, it is before the right accrued unto him; and therefore the remainder here is not to be

1. Co. 66. b. Co. Lit. 22. a. Moor, 593. 104. Hob. 338. 6. Co. 17. 2. Leon. 219. 1. Roll Ab. 817. 3. Lev. 433. 1. Vent. 216. 229. 2. Sid. 67. 3. Wilſ. 399. Fearn. 102. 248.

BALDWIN *against* [illegible]

regarded as an ancient right. And I have the report of a case in this court, where a *feme* tenant for life, the remainder to the right heir of the *baron*, the *baron* made a feoffment with warranty, the opinion of *Dyer* and others was, that the right heir of the *baron* should be bound thereby.—BEAUMOND. The warranty cannot bar, if there be a remainder in expectancy; because a warranty ought always to bind him who hath right of entry or of action: and here he hath not any of them in his father's life-time, but the feoffment of itself destroyed it, because it never came *in esse*. *Et adjournatur*.—Afterwards in *Trin.* 38. *Eliz.* it was adjudged for the avowant, that this remainder by this feoffment and warranty (*a*) was destroyed and barred. *Vide* 1. *Co.* 66.

1. Co. 66. b.

(*a*) See 4. Ann. c. 16. s. 21. 2. Wilf. 322.

CASE 21.

Palmer *against* Wolley.

LONDON is not a *market overt* as to goods privately or improperly purchased.

ACTION SUR TROVER.—A prescription was alledged, that every shop in *London* should be said to be a market overt for all wares there sold; which the Court upon the first motion conceived to be too general and unreasonable a custom.—ANDERSON said, it had been agreed, that if one buys in a shop any thing which appertains not to his trade, as to buy plate in a mercer or draper's shop, it is not a *market overt* as to that purpose; so if the sale be in a back shop, or in another place not open, no property shall be changed by such sale.

5. Co. 83. Pop. 84. 1. And. 344. Moor, 360. Cro. Jac. 68.

See 1. Jac. 1. c. 21. Stra. 1187. 1. Peer. Will. 8. 3. Atk. 44.

CASE 22.

Fox *against* Carlyne.

Entry congeable.

BROWNLOW, *the prothonotary*, shewed me a record, *Trinity Term*, 37. *Eliz. Roll* 927. in *C. B. Fox v. Carlyne*, where upon a special verdict the case was, That one devised land for years to *J. S. reddend' et solvend'* 20*s. annuatim* at *Mich.* to *J. D.* and for non-payment of that sum the heir entered, supposing that those words made a condition, and that the condition was broken, and that he therefore might enter. And his entry was adjudged congeable.

Ante, 205.

CASE 1.

Stubbings *against* Rotheram.

Michaelmas Term, 37. & 38. *Eliz.*—*In the Exchequer Chamber.*

Neither *debt* nor *assumpsit* will lie against an executor upon a promise of the testator's in consideration of marriage.

ERROR upon a judgment given in an *assumpsit* against an executor upon a promise of the testator's. Where the plaintiff declared, that the testator in consideration of marriage promised to pay to the plaintiff an hundred pounds; and for not performing this promise brought the action; and judgment there given for the plaintiff. And this matter was assigned for error, That the action lay not against an executor.—And all THE JUSTICES and BARONS (except CLERK, *Baron*) held it to be erroneous, for this cause. For ANDERSON said, the reason why *debt* lies not against an executor upon the contract of the testator's, is because the law doth not intend that he is privy thereto, or can have notice thereof; and he cannot gage his law for such a debt as the testator might: and when debt will not lie, it is not fit that this action upon a bare promise should tie him; for it stands all upon one reason; and if these actions should be allowable, it would be very mischievous. Wherefore the judgment was reversed.—*Quære*, Whether a recovery in this action against an executor is allowable against a debt

Ante, 121. Post. 459.

4. Co. 93. 9. Co. 87 a. *contra*. Cowp. 284. 375.

debt upon an obligation, if it ſhould be an adminiſtration; for it would be then miſchievous to creditors: and if it ſhould not be an adminiſtration, it would be then miſchievous to executors, that they ſhould be charged therein, and have not allowance thereof againſt other creditors; for it may be that at the time of the recovery they did not know of other debts.—NOTE. This Term the like judgment was given betwixt *Gryggs and Helhouſe*, in an action brought againſt an adminiſtrator upon a promiſe of the inteſtate's to pay monies, &c.

STUBBINGS *againſt* ROTHERAM.

Chamberlayn *againſt* Nichols.

CASE 2.

ERROR upon a judgment in debt upon an obligation. The error aſſigned was, Becauſe the obligation being ſingle, the defendant pleaded payment without an *acquittance*; and iſſue taken thereupon, and found for the plaintiff, and judgment accordingly; whereas it is not any plea, and ſo the iſſue taken upon a void and no plea, and therefore an ill and void trial; and therefore the judgment thereupon is erroneous.—But ALL THE JUSTICES and BARONS held, although it were an *ill plea* (*a*), upon which the plaintiff might have demurred, yet an iſſue being taken and found by verdict, it is holpen by the ſtatute; and the truth is, there was not any payment: wherefore the judgment is well given accordingly. And the judgment was affirmed.

The plea of payment without an acquittance to debt on a ſingle bond is bad upon demurrer, but good after verdict. Ante, 157. 228. 259. 367. 440. Poſt. 456. 458. 697. 777. 716. 884.

5. Co. 43. a. Cro. Jac. 86. 312. Ld. Raym. 90. S. C. Moor, 632.

(*a*) A *void plea* is not aided by 32. Hen. 8. c. 30. 1. Com. Dig. 332.

Philips *againſt* Sackford.

Eaſter Term, 36. *Eliz. Roll* 488.

CASE 3.

ERROR of a judgment in an *aſſumpſit*. Where the plaintiff declares, that in conſideration the plaintiff would forbear to ſue one *Brediman* for twenty pounds debt which he owed unto him, that he aſſumed to pay the aforeſaid twenty pounds before *Michaelmas*; and alledgeth *in facto*, that from the time of the *aſſumpſit*, *abſtinuit* from ſuing him, *et adhuc abſtinet*; and after *non aſſumpſit* pleaded, and found for him, it was adjudged for the plaintiff.

A promiſe to forbear *indefinitely* is not a good conſideration in *aſſumpſit*; but where a time *certain* is named for payment, a requeſt before the day is not neceſſary.

The Firſt Error aſſigned was, Becauſe he alledgeth not any requeſt, but generally *licèt ſæpiùs requiſitus, &c.*—*Sed non allocatur*; for where a time certain is limited for the payment of any thing, he never ſhall alledge a requeſt before the day; but otherwiſe it is where it is incertain.

A SECOND ERORR aſſigned was, That the conſideration that he would forbear, &c. and ſheweth not for what time, is not a ſufficient conſideration; for it may be, that he forbore but for a quarter of an hour, or other ſmall time: and although it were alledged *quòd abſtinuit, et adhuc abſtinet*, that will not help it.—And of that point THE JUSTICES doubted; but the greater part held, that it was not a ſufficient conſideration. *Sed adjournatur*.—And afterwards for this cauſe it was reverſed.

Poſt. 561. Ante, 387. 2. Cr. 683. Ante, 19. 2. Cr. 683. 1. Rol. 27.

Bingham *againſt* Smeatkwick.

Hilary Term, 37. *Eliz. Roll* 362.

CASE 4.

ERROR of a judgment in an *ejectione firmæ*. Where *S.* declares of a leaſe of *Will. Yerbury*, 13. *April*, 36. *Eliz.* of the lands in queſtion for three years.

Special pleading.

BINGHAM *against* SMEATEWICK.

The defendant ſaith, that long time before *Will. Yerbury* the leſſor had any thing, one *Thomas Chaffyn* was thereof ſeiſed in fee, and 25. *March*, 24. *Eliz.* let them to *John Yerbury* for twenty-one years; which *John Yerbury*, 3. *April*, 32. *Eliz.* let them to *Will. Yerbury* for eight years, if one *Arthur Yerbury* ſhould ſo long live; that the ſaid *W. Yerbury* being ſo poſſeſſed, the reverſion over to *John Yerbury*, that *John Yerbury*, the 11. *July*, 33. *Eliz.* died inteſtate; that adminiſtration of all the goods of *John Yerbury* were committed by the archbiſhop of *Canterbury*, becauſe he died poſſeſſed of divers goods in divers dioceſes within the province of *Canterbury*, to *Henry Blake*; that *William Yerbury* ſo being poſſeſſed, let, as it is alledged in the declaration; that afterwards, *viz.* 15. *April*, 36. *Eliz.* *Arthur Yerbury* died; whereupon the defendant, as ſervant to *Henry Blake*, and by his command, ejected him. *Et hoc, &c.*—The plaintiff replies, confeſſing the leaſe to *John Yerbury*; but further ſaith, that the ſaid *John Yerbury*, 30. *Jan.* 30. *Eliz.* granted all his intereſt to *Arthur Yerbury*; that the ſaid *Arthur Yerbury*, 31. *July*, 35. *Eliz.* died inteſtate; that the archbiſhop of *Canterbury*, 27. *Aug.* 35. *Eliz.* committed the adminiſtration of all the goods of *Arthur Yerbury* to the ſaid *William Yerbury*, who by force thereof entered and made a leaſe *prout* in the declaration, &c.; and traverſes, that the ſaid *John Yerbury* let it to *Will. Yerbury* for eight years, *prout* in bar.—Upon this iſſue was joined, and found for the plaintiff, and judgment given for him.

The Error aſſigned was, That he had traverſed that eſtate which was an eſtate determined, and by him in his replication avoided before; for he in his replication affirms, that the ſaid *John Yerbury*, 30. *Eliz.* *&c.* (which is before the leaſe alledged to be made to *Will. Yerbury*) had granted all his eſtate to *Arthur Yerbury*, under whom he made title; then although afterwards he makes this leaſe to *Will. Yerbury*, it is not material, ſo he hath well avoided it; then the traverſe is idle, and iſſue joined upon a vain matter; and then the verdict thereupon ill, and the judgment erroneous; and therefore it is like an iſſue taken upon a colour given in an action of treſpaſs, that if it be tried, yet it is a jeofail, and not remedied by the ſtatute.

Poſt. 651.

But ALL THE JUSTICES and BARONS, except WALMSLEY, held, that although it be an ill traverſe, and an ill iſſue joined (as it is agreed by them all that it was), yet being tried, and verdict given, it is aided by the ſtatute of jeofails, and the judgment thereupon is well given.

A SECOND ERROR aſſigned was (but that was *ore tenus*), That in the replication the plaintiff hath not made any good title; for he conveys to himſelf title as adminiſtrator of the goods of *Arthur Yerbury*, committed unto him by the archbiſhop of *Canterbury*; and he doth not ſhew that the archbiſhop was ordinary, nor that the inteſtate had goods in divers dioceſes; and if he had not, the archbiſhop had no authority to commit adminiſtration; and then he hath not any title, and judgment ought to be given againſt him.

But ALL THE JUSTICES, except WALMSLEY, held, that in regard it was in the replication, and but the inducement of a traverſe, wherein if he had not made any title at all, but had ſaid, that *Will. Yerbury* made the leaſe unto him *prout* in the declaration,

tion, and traverſed, ABSQUE HOC that *J. Yerbury* let unto him during the life of *A. Yerbury*, it had been good enough; wherefore the making of an inſufficient title in his inducement to the traverſe is not material, eſpecially being after verdict found: but they held, that ſuch manner of pleading had not been good, unleſs he had averred, that he had aſſets in divers dioceſes; or that it was within the dioceſe of *Canterbury*, or that he was *loci illius ordinarius*; but for the reaſons aforeſaid the judgment was good enough, and not to be reverſed.

BINGHAM *againſt* SMEATKWICK.

Ant. 6.

But it was moved by COKE, *the Queen's Attorney*, that the committing of adminiſtration being by the archbiſhop, although he had not goods in divers dioceſes, becauſe it is in his province wherein he hath juriſdiction, is *not void*, but *only voidable* by ſentence; and it is not like to an adminiſtration committed by another biſhop of the goods of a man who died in another dioceſe, or who had goods in divers dioceſes; and this difference hath been taken and agreed in the queen's bench, and therefore the plea is well enough.—But THE JUSTICES ſaid, that it was all one, and that the adminiſtration is void in both caſes, and not avoidable only. But yet for the reaſons aforeſaid, they held that it was not error; but the judgment was affirmed. *Vide* 30. *Hen.* 6. *pl.* 13. *Plowd.* 277. 10. *Hen.* 7. *pl.* 8. 5. *Co.* 30.

An adminiſtration by an archbiſhop, where there are not *bona notabilia* to warrant it, is void.

Ante, 283. 315. 456.

5. Co. 30. 8. Co. 135. Lut. 30. 2. Leon, 155. 1. Salk. 39. Peere Will. 43. 767.

Hilary

Hilary Term.

38. Eliz. In the Queen's Bench.

Sir John Popham, *Knt. Chief Juſtice.*
Sir Francis Gawdy, *Knt.*
John Clench, *Eſq.* } *Juſtices.*
Edward Fenner, *Eſq.*
Sir Edward Coke, *Knt. Attorney General.*
Sir Thomas Fleming, *Knt. Solicitor General.*

CASE 1.

Corbyſon *againſt* Pearſon.

If iſſue be joined upon a preſcription which on *demurrer* would be bad, it will be aided after verdict by 32. *Hen.* 8. c. 30. Ante, 445. 455. 1. Co. Dig. 331. Gilbert's C. P. 138. 2. Saund. 324.

TRESPASS for the taking of his beaſts, *viz.* four cows, in a place called *Breachleys*, and chaſing and impounding them without cauſe. The defendant juſtifies, as in his freehold, for *damage feaſant*. The plaintiff by replication ſhews, that he is, and time whereof, &c. was ſeiſed of a meſſuage and twenty acres of land in *D.* and that he and all whoſe, &c. have had from time, &c. common for all his beaſts *levant et couchant* upon the ſaid tenements, &c. in the place WHERE, every year after the ſown corn was ſevered and carried away until it was re-ſown; and that he there, after the corn was ſevered and carried away, put in his ſaid beaſts into the place WHERE, &c. *utendo communia ſua prædicta, &c.* The iſſue was taken upon the preſcription, and found for the plaintiff: and now moved in arreſt of judgment, that the replication was not good; and ſo the plaintiff ought not to have judgment, becauſe he ſaith, that he put in his cattle after the corn ſevered and carried away, and ſaith not that it was before the land was re-ſown; for otherwiſe he had no title to common.

SECONDLY, Becauſe he avers not that thoſe cattle were *levant et couchant* upon the land aforeſaid; for otherwiſe he cannot uſe common with them, nor hath not ſufficiently intitled himſelf to put them in; and in proof thereof vouched 10. *Edw.* 3. *pl.* 56. *and the Precedents in the Book of Entries*, "*Treſpaſs in Common*," 9. & 11. —But all THE JUSTICES held, that in regard iſſue is taken upon the preſcription; although peradventure the plea is ill, and ought to be adjudged againſt the plaintiff, if he had demurred thereupon for this cauſe; yet it now ſhall be taken to be good enough, and to be holpen by intendment, when it is ſaid that he put them in *utendo communia ſua prædicta*, that it was at ſuch a time as the common is to be uſed, and with ſuch beaſts as are there to uſe the common. Wherefore, without any great argument, becauſe it was after verdict, and might be well intended, and ſo aided by the ſtatutes of *jeofails*, it was adjudged for the plaintiff.

Serle

Serle *againſt* Roſſe.

CASE 2.

ERROR of a judgment given in the queen's bench upon an *aſſumpſit* againſt an executor. And declares, that the teſtator, in conſideration of ſuch a marriage, aſſumed to pay to the plaintiff twenty pounds. The error aſſigned was, Becauſe this action lies not againſt an executor for the non-performance of the teſtator's promiſe.—And for this cauſe the judgment was reverſed.

Aſſumpſit does not lie againſt an executor on the promiſe of his teſtator. Ante, 121. 454. Vide *contra*, Cowp. 375.

Fenner *againſt* Plaſket and Green.

Michaelmas Term, 37. & 38. *Eliz. Roll* 290.

CASE 3.

RESCOUS. The plaintiff declares, that a rent-charge in fee was granted to the *feme* of the plaintiff, and to *Ed. Coſins* her firſt huſband; and that *Ed. Coſins* died, and ſhe took the plaintiff to huſband; and for rent arrear *durante viduitate* of his *feme* he diſtrained; and upon *reſcous* brought this action. The defendant hereupon demurred in law; but ſhewed not any cauſe of his demurrer. But the principal cauſe (as I heard) was, that his *feme* was not joined in the action; the diſtreſs being taken for rent due *dum ſola fuit*.—But notwithſtanding it was adjudged for the plaintiff; for it is a *tort* done to the *baron*, for which he might have an action ſole, or may join his *feme* therein, becauſe it ariſeth upon a duty due unto her before the coverture; but it is at his election.

In an action for a *tort* which prejudices a remedy by huſband and wife, the huſband may ſue alone, or they may join. Moor, 422. Cro. Car. 419. 2. Inſt. 563. Strange, 229. 1. Bac. Ab 304.

Rolls *againſt* Germine.

Ante, Page 425. *Caſe* 34.

CASE 4.

THE caſe being now moved again, GAWDY continued his opinion, that debt lies not againſt an executor upon a ſimple contract with the teſtator, although he acknowledgeth the contract, or admits thereof; but the Court *ex officio* ought to abate the writ. But POPHAM and FENNER *è contra*.—But then there was another matter moved, that this action of debt would not have lain if it had been brought againſt the teſtator himſelf for part thereof, *viz.* for ſo much as he expended as ſolicitor in ſuits in the queen's bench; for thoſe are not allowable by the law, for ſuch fees which he expends in ſuch buſineſs, and therefore no action lies for them; but an attorney in ſuch caſes where he is attorney, may lay out fees, and have debt for them (*b*).—And of this opinion were POPHAM, CLENCH and GAWDY; but FENNER doubted thereof.—Afterwards, in *Paſch.* 38. *Eliz.* being moved again, they held their opinion, that for thoſe fees the action lay not; ſo the writ was abateable in all: and therefore they gave rule, that if other matter were not ſhewn the fourth day in *Trinity Term* following, that judgment ſhould be reverſed.

An action of debt will not lie by an attorney of *C. B.* againſt an executor upon a contract of the teſtator for fees in *C. B. and alſo for ſoliciting cauſes in B. R.* Poſt. 760. 804. 1. Saund. 286. Moor, 366. Cro. Jac. 521. Cro. Car. 159. Cowp 375.

(*b*) But now by 2. Geo. 2. c. 23. ſ. 10. an attorney may practiſe in other courts than that in which he is admitted.

Wilſon *againſt* Packman.

Hilary Term, 37. *Eliz. Roll* 416.

CASE 5.

ACTION SUR TROVER and converſion of goods. Upon demurrer the caſe was, The ordinary committed adminiſtration of the goods of an inteſtate to the defendant; afterwards the next of kin ſues a citation in the court chriſtian againſt the defendant, to repeal that adminiſtration; and he *pendente lite* ſells upon citation, will authoriſe all acts done, even *pendente lite*, by the firſt adminiſtrator. Ante, 163, Poſt. 565.

Adminiſtration regularly granted, though to an improper perſon, and eventually repealed

WILSON *against* PACKMAN.

thoſe goods; and afterwards his adminiſtration is repealed, and adminiſtration committed to the plaintiff; who for this converſion *pendente lite* brings this action. It was moved for the defendant, that this action lies not; and the adminiſtration at the common law is well committed; and the ſtatute doth not alter the law in this point, but gives a penalty againſt the ordinary, if he commits them not to the next of kin; and the adminiſtrator, until adminiſtration repealed, hath an abſolute authority to diſpoſe of the goods as he pleaſes.—TANFIELD *è contra*. The converſion *pendente lite* in court chriſtian is not lawful, but is a *tort* to the plaintiff, and that the ſentence there proves; which is, that all things attempted or done *pendente lite* ſhall be void; and the Juſtices ought to have regard to the civil law in this point, as in 27. *Hen.* 6. "*Gard.*" 118. 2. *Rich.* 2. "*Quare Impedit*" 143. and 4. *Hen.* 7. *pl.* 13. And by the ſentence it appears, that the adminiſtration is revoked, as if it never had been; and upon this reaſon it is in *Dyer*, 339. where an adminiſtrator recovered a debt, and afterwards another procured himſelf to be joined in the adminiſtration, and releaſed the debt; and afterwards it being revoked, this releaſe was not any bar to the execution: and *Mich.* 35. & 36. *Eliz.* in the common pleas, betwixt *White and Cary*, this very point was in queſtion; and adjudged that the action lay.—GAWDY. The action well lies, for the ſentence doth not repeal mean acts done by an adminiſtrator, which are for the inteſtate's benefit: but foraſmuch as theſe goods were not converted or employed for the inteſtate's uſe, it is reaſonable that he ſhould be charged for them.—POPHAM and FENNER *è contra*. For the adminiſtrator hath an abſolute and lawful intereſt and power to diſpoſe of the goods until the repeal be made; and it is not like to an appeal upon a ſentence, for that makes it as no ſentence: but the appeal of the letters of adminiſtration doth not avoid it *ab initio*, and make a lawful act tortious; but rather, in this caſe, the new adminiſtrator ſhall have an accompt for the monies received. And the words in the ſentence are not to be regarded; for they are ordinary in all ſentences. So he having the goods lawfully, and converting them lawfully, ſhall not anſwer for them as for a *tort* done.—And POPHAM here ſaid, if adminiſtration being committed, the ordinary commits new adminiſtration, it is a repeal of the former without any ſentence of appeal (*a*); and if the firſt adminiſtrator waſte the goods, the debtee ſhall have the action againſt him; and if he pleads that adminiſtration is committed over, he may well by his replication maintain it, becauſe he waſted the goods when he was adminiſtrator. Wherefore, &c. *Et adjournatur*.—But afterwards the action was diſcontinued by the plaintiff. 6. *Co.* 18.

1. Roll. Ab. 303. 6. Co. 18, 19. Moor, 396. 636. Salk. 38. 2. Lev. 50. 55. Raym. 224. Brownl. 51. Cro. Car. 62. Style, 10. Latch. 67. 1. Lev. 186. 1. Wood's Con. 88. 2. Stra. 917. Fitzg. 202. 2. Peere Will. 578. 2. Atk. 285. Ld. Raym. 684.

(*a*) And. 303. Owen, 50. 1. Salk. 38. Sed vide ante, 315. Style, 10. 102. 1. Sid. 409. 1. Peere Will. 42.

CASE 6.

Curteis *againſt* Savel and three Others.

If an appellant be non-ſuited by one appellee, it diſcharges all the others as to the appeal. Poſt. 465.

APPEAL for the death of her huſband. Upon ſeveral iſſues pleaded, the plaintiff was non-ſuited upon a trial againſt the one; and, Whether that ſhould be a non-ſuit againſt the reſt? was the queſtion.—And THE WHOLE COURT held it to be a non-ſuit againſt them all: wherefore, as to the ſuit of the party, it was ruled that he ſhould be diſcharged: but held, that the others who were not tried, ſhould be arraigned upon the declaration at the queen's ſuit.

2. Roll. Ab. 133. Dyer, 120. 1. Inſt. 139. 1. Sid. 378. 2. Hawk. 283. 304.

Aſcue *againſt* Hollingworth.

Ante, Page 355. *Caſe* 14.—*C. B. Trinity Term*, 37. *Eliz. Roll* 392.

Case 7.

ERROR of a judgment in the common pleas in debt. The caſe was, That *Aſcue* was bound to *Hollingworth* in a ſtatute ſtaple acknowledged before the mayor of *Lincoln* in 200l. and *Aſcue* thereto put his ſeal, and the ſeal uſed at *Lincoln* for one hundred years for that purpoſe was alſo put thereto; but becauſe it was not enſealed with a ſeal of two parts, according to the ſtatute of *Acton Burnel*, 13. *Edw.* 1. c. 4. it was ruled in an *audita querela* between the ſaid parties, that it was void as a ſtatute. Whereupon *Hollingworth* brought his action of debt thereupon as upon an obligation: and all this matter being diſcloſed, and a demurrer joined thereupon, it was adjudged for the plaintiff. *Aſcue* the defendant thereupon brought error; and aſſigned for error the very point in law, that this was not an obligation, and that debt lies not thereupon; and no other cauſe was moved for error.—And it was now argued by PUDRY *for the plaintiff*, and by YELVERTON, *ſerjeant*, *for the defendant*.—GAWDY held, that debt lies not hereupon as upon an obligation; for when a thing is void in the principal and ſuperior operation thereof (as it hath been adjudged here, that it is void as a ſtatute), it cannot be good in an inferior: as 33. *Hen.* 8. *fol.* 50. a pardon of petit-treaſon was no diſcharge of murder; and *Blunt v. Andrews*, bargain and ſale of land and all the woods and underwoods, the deed not being enrolled, it cannot enure as a grant of the wood: and although the books be, that debt lies upon a ſtatute, &c. yet he ought to declare thereof as upon a record, and not as upon an obligation (and ſo all the prothonotaries affirmed to have been always their courſe).—FENNER *accord.* It is not an obligation; for a *non eſt factum* cannot be pleaded in this action: and although it were ſealed by the conuſor, it never was delivered by him as his deed; but he only acknowledged it before the mayor, which is not of any effect to make it to be his deed.—CLENCH. There are words obligatory in a ſtatute as well as in an obligation; alſo in the end he binds his lands and goods, and the acknowledgement makes it afterwards to be a ſtatute; ſo it is an obligation, and more. And *poſito*, that he had ſealed and delivered it as his deed, and had not acknowledged it, it is no queſtion but it had been a good obligation; and although peradventure it had been a good ſtatute, debt had not lain thereupon as upon an obligation, but as upon a record; yet now when it never was any ſtatute, he conceived it might well be ſued as an obligation. Wherefore (POPHAM *abſente*) *adjournatur* (*a*).

A ſtatute ſtaple void as a recognizance may be ſued as an obligation. Ante, 355. Poſt. 494. 544.

S. C. 2. Roll. Abr. 149. Gould. 190. Moor, 405. 1. Hob. 196. 2. Vern. 750. 1. Peere Will. 335. Cowp. 599. 2. Roll. 56.

(*a*) Adjudged accordingly, poſt. 494. 544.

See 23. Hen. 8. c. 6. and 27. Eliz. c. 4.

Case 8.

Haddon *againſt* Arrowſmith.

EJECTIONE FIRMÆ. Upon a ſpecial verdict the caſe was, The queen being lady of the manor of *Winterboure* grants licence by her ſteward to a copy-holder for life within the manor, to make a leaſe for three years, *if he live ſo long*. He lets the land to the plaintiff for three years abſolutely, who upon ejectment by a ſtranger brought this action.—STEPHENS *for the defendant* argued, that this leaſe was not according to his licence, and therefore it is not warranted thereby; for an authority ought preciſely to be purſued, and then an *ejectione firmæ* in this caſe lies not: for although it hath been here adjudged, that leſſee for years of a copyhold

If a copyholder *for life* obtain licence to make a leaſe for three years, *if he live ſo long*, and he grants a leaſe for three years *abſolutely*, yet the leaſe is good; and the leſſee may maintain ejectment;

but a copyholder *in fee* muſt purſue a licence ſtrictly. Ante, 305. 451. Poſt. (469) 483. 535. 676. 717. 728. 1. Roll. Abr. 331. Cro. Jac. 437. Owen, 73. Moor, 184. Poph. 105. 4. Co. 26. Gilb. Ten. 214. Cowp. 26. Dougl. 53. 292. 565. 1. T. Rep. 705. 2. T. Rep. 241. 380. 781.

HADDON *againſt* ARROWSMITH.

which is made without licence of the lord being a common perſon might maintain an *ejectione firmæ*, becauſe he is leſſee, againſt all but the lord, yet when the queen is ſignioreſs it is otherwiſe; for the copyholder cannot diſſeiſe the queen; wherefore it cannot be a good leaſe; for nothing paſſed from the copyholder to the leſſee.—ATKINSON *è contra*. For theſe words, "if he live ſo "long," are but to ſhew how long the leaſe is to continue, which is no more than what the law appoints, and therefore good enough. Wherefore, &c.—Of that opinion was all THE COURT; for the limitation, that he ſhall make a leaſe for three years, if he ſo long live, are but words of ſurpluſage, and no more than the law ſaith; and then the words of the party, "if he live ſo long," if they had been in the leaſe, had been vain. The difference in this caſe will be betwixt a copyholder in fee and a copyholder for life; for if ſuch licence had been granted to a copyholder in fee, and he had granted it for three years abſolutely, that had not been warranted by the licence; for the intent was to give him licence, but not to hurt the heir; and without theſe words in the leaſe, the leaſe is good, and ſhall bind the heir: but it is otherwiſe of a copyholder for life; for the law without theſe words determines the leaſe by his death.—GAWDY ſaid, admitting it to be not warranted by the licence, yet the leſſee may well maintain this action; for there is not any difference betwixt a leaſe made by a copyholder where the queen is ſignioreſs of the manor, and where a common perſon; for in both caſes the leaſe is good betwixt the leſſor and leſſee, and againſt all ſtrangers. *Quod* FENNER *conceſſit*, but CLENCH denied, and POPHAM ſpake not to that point.—And FENNER ſaid, that a lord cannot limit a condition in his licence; for he gives nothing, but only diſpenſeth with the forfeiture, and all the eſtate paſſeth from the copyholder; wherefore he could not annex thereto a condition, no more than the heir might aſſign dower upon condition, or an executor deliver a legacy conditionally: and POPHAM thereto agreed. But here this is not a condition, but a limitation of the eſtate, which he might well limit. But in the principal point they all agreed. Wherefore it was adjudged for the plaintiff.

Ante, 451.

CASE 9.

Smith *againſt* Freeman.

Diſtrictionem for *deſtructionem* in an original writ for waſte, is a fatal variance.

Ante, 119.

ERROR upon a judgment in waſte. The writ recites the ſtatute, *quod nullus faciat vaſtum venditionem ſeu diſtrictionem*, where it ſhould be *deſtructionem*. And it was prayed that it might be amended, for it is but the default of the clerk.—And it was held by ALL THE COURT, that it could not be amended, becauſe it is in the original writ. 5. *Co.* 45.

5. Co. 45. a. Ld. Ray. 1515. Stra. 787. Cowp 229. Dougl. 194. 1. Term Rep. 235. 237.

CASE 10.

Green *againſt* Wilcoks.

Michaelmas Term, 37. & 38. *Eliz. Roll* 332.

An executor may confeſs a judgment to one creditor pending an action by another; and on this judgment pleaded, the plaintiff cannot reply *covin* without traverſing that it was for a juſt debt.

DEBT againſt an executor. The defendant pleads, that hanging this action *J. S.* brought another action of debt for an hundred pounds, true debt of the teſtator's, which action he had confeſſed; and that he had *riens inter maynes* beſide to ſatisfy that judgment. The plaintiff, *proteſtando* that it was not a true debt, for replication ſaith, that this recovery was by *covin* to defeat him of his action. And it was thereupon demurred in law, becauſe he ought to anſwer thereto, if it be a true debt; and if ſo, it cannot be recovered by *covin*, and ſo the *covin* is not iſſuable.—But ALL

Sed vide ante, 41. 1. Lutwyche, 662. Dr. & St. 77. Moor, 678. 705. Sid. 21. 1. Leon. 69. 3. Vern. 300. Brownl. 50. 5. Com. Dig. 203.

THE COURT held, that the replication was good enough; for if the recovery be not by *covin*, the plaintiff is barrable, and therefore it is the principal matter to be anſwered; and the conuſance of the action is not material, *viz.* whether it be a true debt, and an action truly purſued; and a recovery may be *covinous*, although it be upon a true obligation. As *Mich.* 36. & 37. *Eliz.* in *Sarah de Banhault's Caſe* in this court, where the teſtator was obliged in an obligation (with an intent to defraud creditors) to pay a thouſand pounds; the obligee brings debt thereupon in *Windſor* court againſt the executrix, and recovered; and it was pleaded in bar here; and the iſſue was, Whether the recovery were by *covin* by rule of the Court? and found againſt the defendant; yet there it was a true debt, and judgment given accordingly. So here: wherefore, &c. And the Court moved the parties, that the defendant ſhould pay coſts and waive the demurrer.—And afterwards upon a motion it was adjudged for the plaintiff, and error thereof brought, and reverſed for the matter in law; for it cannot be a *covinous* recovery if the debt be true, and the *covin* alledged is not material.

GREEN *againſt* WILCOKS.

Sir Henry Knevett *againſt* Pool and Hawkins and Two Others.

CASE 11.

Trinity Term, 36. *Eliz.* *Roll* 326.

TRESPASS, *quare clauſum fregit*, and his corn there growing, cut and carried away. Upon not guilty pleaded, a ſpecial verdict was found; and thereupon the caſe was, "Tenant "for life, remainder for life: the tenant for life makes a leaſe for "years to *Hawkins*, who is ouſted by a ſtranger, who commits a "diſſeiſin. The diſſeiſor makes a leaſe for years; his leſſee ſows "the land. The tenant for life dies. He in remainder (the corn "not being ſevered) and the firſt tenant for years of the tenant for "life, the diſſeiſor and his leſſee for years enter, and cut and "carry away the corn. The tenant for life in remainder brings "treſpaſs. *Et ſi, &c.* And found damages ſeverally for entering "into the land, and for the corn carried away."—As to the entering into the land, it was held clearly, that the verdict is againſt the defendant; for although ſome of them had title to have the corn, and the others in aid of him might come and enter upon the land to carry the corn away, yet that is by liberty in law, which ought to have been pleaded, and cannot be given in evidence, nor ſhall be holpen upon the verdict. And THE WHOLE COURT was clearly of that opinion. Wherefore as to that the plaintiff ſhould have judgment.

A licence in law muſt be pleaded, and cannot be given in evidence.

As to the corn, TANFIELD, *for the plaintiff*, argued, that they appertained to him in remainder, and not to the leſſee for years of the tenant for life; nor to the diſſeiſor nor his leſſee. 1. To *Hawkins*, the firſt leſſee, they appertained not, becauſe they did not ſow them at his own coſt, nor was in poſſeſſion of the land at the time of his eſtate determined; and the ſole reaſon why a leſſee whoſe eſtate is determinable upon an uncertainty ſhall have the emblements, is, becauſe as they ariſe out of his labour and coſts, the law gives him that privilege after the determination of his eſtate; which is the reaſon given in *Broke*, "*Emblements*," *pla. ultimo*; but if he were not at the coſt and labour to ſow it, he ſhall not have the corn, but he who ſhould have the land ſhall have the corn; for *quicquid plantatur ſolo, ſolo credit*; and therefore if a man ſow land, and

If the leſſee of a tenant for life be diſſeiſed, and the leſſee of the diſſeiſor ſow the land, and then the tenant for life dies, and he in remainder enters, yet he ſhall not have the *emblements*, but the leſſee of the tenant for life. Ante, 61. 460.

S. C. 5. Co. 85. a. Dyer, 31. Co. Lit. 55. Winch. 51. Godb. 159. 1. Com. Dig. 599. 3. Wilſ. 271. Dougl. 283.

KNEVETT *againſt* POOL and HAWKINS and two Others.

lets it for life, and the leſſee for life dies before the *corn* be ſevered, his executor ſhall not have them, but he in reverſion; but if he himſelf ſowed the land and died, it were otherwiſe. So if tenant for life ſows the land, and grants over his eſtate, the grantee dies before the corn ſevered, his executor ſhall not have the corn: which caſes GAWDY and POPHAM agreed. So *Mich.* 29. & 30. *Eliz.* there was a caſe in this court, where a man ſowed his land, and deviſed his lands for life, remainder in fee; tenant for life dies, the corn not ſevered; the queſtion was, Whether the executor or he in remainder ſhould have it? and held that he in remainder; which caſe they all agreed: then here this reaſon is ſtrong againſt the firſt leſſee that he ſhould not have it. But if he had entered, living the tenant for life, and had continued his poſſeſſion until his death, it had been otherwiſe; for then it ſhall be conſtrued, as if he always had continued in poſſeſſion, and had ſown it himſelf; but when he did not enter, it was his folly and his *laches* to prejudice himſelf: and the diſſeiſor nor his leſſee for years ſhall not have them; for their eſtate is uncertainly determinable by their own *tort*, which the law will never regard, nor give any privilege thereto. Wherefore, &c.—But ALL THE JUSTICES (*abſente* CLENCH) reſolved to the contrary, that the corn appertained to *Hawkins*, the firſt leſſee of the tenant for life; for he having right to it at the time of the death of the tenant for life, the law ſhall preſerve his title and right as if he had entered. For GAWDY ſaid, if he had entered in the life of the tenant for life, it is clear that he ſhould have had the corn. Now when he could not enter, the law ſupplies his entry: as 19. *Hen.* 6. 28. "*Tenant pur autre Vie*" is diſſeiſed; he ſhall not have treſpaſs for the mean profits until the re-entry; but if *ceſty que vie* dies, ſo as he cannot re-enter, the law ſhall give him the action without re-entry. Then leſſee for years having right to have them in the life of the tenant for life, it is not reaſon it ſhould be taken from him by the uncertainty of the death of the tenant for life; wherefore he in the remainder hath no right to have them; wherefore he ſhould not have his action againſt the defendant: and it was therefore held, that the plaintiff had no cauſe to recover.—And afterwards *Paſch.* 38. *Eliz.* their opinion being again delivered openly in court, it was commanded that judgment ſhould be entered for the defendant, if other cauſes were not ſhewn to the contrary by the laſt day of the Term: and it was adjudged accordingly. 5 *Co.* 85.

Hob. 132. 1. Roll. Abr. 727.

1. Roll. Abr. 727.

CASE 12.

Penryn *againſt* Corbet.

Trinity Term, 37. Eliz. Roll 504.

In an appeal of murder, the jury may acquit of the murder, and find not guilty generally, or guilty of the homicide; and being a verdict for the crown, and not for the party, it may be pardoned, but the appellant cannot

APPEAL of murder, of the death of his brother. It was tried by *niſi prius* in *London*; and all the Juſtices of the king's bench ſat upon it in the *Guildhall* in *London*. The jury found him not guilty of the murder, but guilty of homicide: and this by advice of the Court they might well do; and they might if they would (if they thought him not guilty of the murder) have found him not guilty generally, and not have ſpoken of the homicide; and it is at their election in this caſe how they will give their verdict. Afterwards this matter was moved in court, Whether this verdict was well found, and ſhould be a conviction for the homicide?—POPHAM ſaid, that it was ſo ruled by the

enter a *nonſuit*, though he may a *retraxit*. Ante, 276. 460. Poſt. 632. Moor, 407. Noy 88. Lateh. 173. 5. Co. 50.

advice of all the Juſtices of *England* in *Stowel's Caſe*. *Vide the Caſe of Wrott and Wiggs*, where the jury found him not guilty generally, and would not find him guilty of the homicide, although the evidence was pregnant, that he was guilty thereof; yet it was good by the advice of all the Juſtices of both benches. The defendant then pleaded the queen's pardon, and prayed to have it allowed: and a precedent was ſhewn, *Paſch.* 8. *Eliz. Rot.* 33. *Muſgrave's Caſe*, where the defendant pleaded the queen's pardon in this very caſe, and it was allowed; although in 9. *Eliz. Dyer*, 261. there was a *quere* thereof.—But POPHAM ſaid, it was a ſtrong precedent; for it is hard the queen ſhould pardon that which is the ſuit of the party; and there is no queſtion if it had been an appeal of homicide, as it well might, the queen could not have pardoned it: whereto COKE, *the Queen's Attorney*, of counſel with the defendant, agreed; for it is merely the ſuit of the party. But here the ſuit of the party is an appeal of murder, and that wherein he is found guilty is not for the party, but for the queen; wherefore the Court would adviſe thereof until the next Term.—Afterwards, *Paſch.* 38. *Eliz.* the plaintiff being compounded with, would have been nonſuited. And the Court doubted whether it might be allowed, being after a general verdict, although it were in another Term. It was then prayed that a *retraxit* might be entered thereof, And therein alſo the Court doubted whether it might be (*a*); but they would adviſe.

PENRYN *againſt* CORBET.

(*a*) See 2. Hen. 4. c. 7. 2. Hawk. 267.

Wilkinſon's Caſe.

CASE 13.

WILKINSON by colour of a writ *de vi laicâ removendâ* awarded out of the chancery, returnable in this court, was put out of poſſeſſion by the ſheriff, and the poſſeſſion by that means gotten by his adverſary.—And this being ſuggeſted to the Court by affidavit, reſtitution was awarded: and to that purpoſe a precedent was ſhewn, 35. *Eliz. Rot.* 66. between *Erkenſall and Palmer*, for the parſonage of *Wiberton* in the county of *Cambridge*; in ſuch caſe, upon ſuch a ſuggeſtion, reſtitution was awarded.

The Court may award reſtitution where poſſeſſion is colourably obtained.

Moor, 462.

Walter *againſt* Dawes.

CASE 14.

Trinity Term, 37. *Eliz. Roll* 458.

ASSUMPSIT as executor to *Robert Walter* his father. For that whereas the ſaid *Walter*, the teſtator, was Juſtice of aſſiſe in the county of *Glamorgan*, and two other the adjoining counties, and that every Juſtice of aſſiſe there had uſed time whereof, &c. to appoint an officer called the clerk of his fines, who hath the ingroſſing of all fines within the ſaid circuit, and had 5s. for the ingroſſing of them; the defendant, in conſideration that the teſtator would appoint him to that office, aſſumed to pay unto him twenty marks *per annum*, *quamdiu* he ſhould exerciſe it; and that the teſtator appointed him to that office; and that he executed it for three years; and for non-payment of theſe twenty marks *per annum*, for the three years, he brought the action. The defendant pleads, that he did not exerciſe that office: and iſſue being joined thereupon, and tried by a *viſne* of *D.* in the county of *Worceſter*, where the action was brought, and found for the plaintiff, this matter was alledged in arreſt of judgment; Becauſe this office by intendment

A Judge of aſſiſe cannot preſcribe for the appointment of an officer to ingroſs his fines within the circuit of which he is judge; but if an action lay, it muſt be tried where the office is exerciſed.

2. Roll. Ab. 599. Gould 180. Moor, 412. Cowp. 47.

WALTER *against* DAWES.

is to be exercised in the counties in *Wales*; and then the trial ought to have been in the county of *Hereford*, being the county next adjoining, and not in the county of *Worcester*.—And of that opinion was THE WHOLE COURT; for although the office might be exercised in any place by ingrossing the fines in any place; yet it shall not be so intended to be out of the circuit, unless it be expressly shewn. They also held, that this was not any office, and therefore the appointing him to be his clerk of the fines is not any consideration to maintain this action. Wherefore without further argument it was adjudged for the defendant, *absente* GAWDY.

CASE 15.

A husband is not intitled to a term granted to another *in trust* for the use of his wife. 1. Rol. 346. Co. Lit. 351. a.

Wytham *against* Waterhouse.

A LEASE for years was granted to the defendant to the use of the grantor's sister, whom he afterwards should marry; and he married her accordingly, and then died. The *feme* takes the plaintiff to husband, and afterwards she died. The defendant takes administration of the plaintiff's wife's goods. The plaintiff sued the defendant in chancery to have this Term.—And it was there decreed, by the advice of ALL THE JUSTICES of *England*, that neither the term nor the use thereof appertained to the plaintiff.

CASE 16

If a sheriff take bond for appearance at *Westminster*, and the Term be adjourned to *Hertford*, yet the defendant must appear where *the court* is held out of which the writ issued. Moor, 450. See 1. Com. Dig. 233.

Appearance must be entered.

Corbet *against* Cook.

Michaelmas Term, 37. & 38. *Eliz. Roll* 602.

DEBT upon an obligation conditioned, that if he appeared at *Westminster* such a day, to answer, &c. that then, &c. (this was a sheriff's bond). The defendant pleaded, that before the day of the return of the writ, the Term was adjourned to *Hertford*; and that there he appeared; and thereupon the plaintiff demurred.—It was first moved, Whether this plea were good, the obligation being taken (as by intendment it might be) after the adjournment of the term, whether he ought not to appear at *Westminster* or at *Hertford*? But it was held, that the obligation shall always relate to the day and place comprised in the writ; for that shall not have regard to the adjournment: and yet if the Term be adjourned he ought to appear in the queen's bench, or otherwise he shall forfeit his bond; as 9. *Edw.* 4. is; and so are divers precedents.

SECONDLY, It was moved, that the plea was not good; because he doth not conclude, *prout patet de recordo*; for although he appeareth, yet if his appearance be not entered upon record, he forfeits his obligation, and he ought to conclude so; otherwise the plaintiff cannot have an answer thereto, to say *nul tiel record*.—And of that opinion was all THE COURT.

CASE 17.

A caption upon a *capias utlagatum* made returnable five years after the *teste* is not legal; and it is no escape, tho' the sheriff suffer the prisoner to be at large.

Nector and Sharp, Executors of Thrower, *against* Gennet.

Trinity Term, 37. *Eliz. Roll* 178.

PROHIBITION against *Gennet* and others, wardens of the company of tallow-chandlers in *London*; surmising, that the defendants sued them in the court christian for a legacy of 200l. given to them by the testator of the plaintiff; and that they there pleaded that their testator was keeper of *Ludgate*, and was possessed of goods to the value of 320l. and no more; and was obliged in an obligation of 1000l. to *Spencer and Massam*, sheriffs of *London*, that he should safely keep the prisoners committed to his charge; and

Ante, 164. 188. 271. Post. 706.—S. C. Owen, 72. S. C. Gould. 141. S. C. Moor, 415.

should

NORTON and SHARP *against* GENNET.

should save the sheriffs harmless from all escapes, &c. and shews that one *Helms* was taken upon a *capias utlagatum* after judgment in debt, and escaped; and debt was brought upon this escape against the sheriffs of *London*, and judgment against them; and so the obligation forfeited; so there was *riens inter maynes* more than to satisfy this obligation; and because the ecclesiastical court would not allow of this plea, a prohibition was sued. It was thereupon demurred.—ATKINSON, *for the defendant*, prayed a consultation; for this plea is not any plea; and therefore the court christian which is to take notice of our law ought not to allow it; for the judgment in debt was 20. *Eliz.* and the *capias utlagatum* whereupon he was taken was 25. *Eliz.* so as the plaintiff could not take benefit thereof; for he was not in execution for him; as one taken by a *capias pro fine* after the year and day, is not in execution for the plaintiff; as 1. *Hen.* 7. *pl.* 19. 36. *Hen.* 6. *pl.* 24.: *quod fuit concessum* PER CURIAM: and then the obligation is not forfeited, for it is not any escape; and therefore an action lieth not against the sheriffs; and if it be not any forfeiture, it is plain that this legacy shall be first paid. But the legatary by the civil law should enter into bond to make restitution, if the obligation should afterwards be recovered, so there is not any inconvenience to any. And to that the counsel on the other side, and THE WHOLE COURT (except FENNER) agreed, that this is no plea unless the obligation is forfeited; but FENNER said he doubted thereof.—COKE. The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day, for it is a duty *maintenant* which is in the condition; as 9. *Edw.* 4. *pl.* 12. is. But otherwise it is where a statute or obligation is for the performance of covenants, or to do a collateral thing; there until it be forfeited, it is not any plea against a legatee, for peradventure it never shall be forfeited, and may lie *in perpetuum*; and by such means no will should be performed.—TANFIELD. The obligation is clearly forfeited; for the condition is, that he shall not suffer any prisoner committed to his prison to escape, and to save the sheriffs indemnified from all escapes, &c. so it is in the conjunctive: and then although the prisoner was not in execution, so as no action of debt lies for the escape, yet being taken by the *capias utlagatum*, the suffering him to escape is a breach of the bond.—COKE. It appears by the record, that the *capias utlagatum* was awarded 25. *Eliz.* and was returnable 35. *Eliz.* so merely void, for every *capias* ought to be returnable the ensuing Term, for the mischief which otherwise might befal the prisoner to be kept always in prison, as appears 21. *Hen.* 7. *pl.* 16. 8. *Edw.* 4. *pl.* 4. *Dyer*, 175. and then he was never lawfully his prisoner, and might well let him at large.—FENNER conceived that being taken by process, he might not dispute whether the process was lawfully or well awarded, but he ought by reason thereof to detain him; and the suffering him to go at large is a forfeiture of the bond. But ALL THE OTHER JUSTICES to the contrary; for although peradventure this arresting by force of this process is excusable in false imprisonment by the sheriff, 14. *Hen.* 8. *pl.* 16. and 11. *Hen.* 4. *pl.* 36. yet clearly it is no lawful imprisonment: and as to the benefit or prejudice of a stranger, he shall never be said to be a prisoner; and the gaoler's suffering him to go at large is lawful; and the obligation is not forfeited thereby. Wherefore consultation was awarded.

1. Roll. Abr. 895. 928. 5. Co. 88. b. 89. b. 21. *Hen.* 7. pl. 27. Dyer, 175. 2. Bulst. 256. 1. Salk. 273. 2. Salk. 700. Farres, 29. Cro. Jac. 289. 11. Mod. 50. 2. Ld. Raym. 772. 775. 2. Bl. Rep. 846. 5. Co. Dig. 178.

Case 18.

Bowyer's Case.

Hilary Term, 27. Eliz. Roll 750.

On a justification in slander, the *venue* must be where the justification is pleaded. Ante, 261. Gould. 188. Moor, 410. 2. Hawk. 429. 2. Saund. 247.

ERROR upon a judgment given in an action on the case for words supposed to be spoken at *Bridgnorth*, in the county of *Salop*. The defendant pleads, that he spake them as a witness upon his oath, upon an issue tried at *Chard*, in the county of *Somerset*. The plaintiff replies *de son tort demesne*, &c. and thereupon it was tried by a *venire* of *Bridgnorth*: and error thereof assigned, because it ought to have been by a *visne* of *Chard*, where the justification arose:—And it was held clearly to be a mis-trial, and not aided by the statute of jeofails. Wherefore the judgment was reversed.

Vide 21. Jac. 1. c. 13. and 16. & 17. Car. 2. c. 8.

Case 19.

Nevell *against* Sydenham.

An immaterial allegation need not be traversed. Qu. If during the existence of the feudal tenures, MARRIAGE belonged to the lord *de mero jure*, without any tender? Ante, 335. Co. Lit. 82. 5. Co. 126. b. 6. Co. 70. b. Cro. Jac. 66. Dougl. 668.

VALORE MARITAGII, against *John Sydenham and Mary his wife*, daughter and heir of *Buckland*. And declares, That the said *Buckland* held of the queen by *knight's service in capite*, and died, *Mary* his daughter and heir being within 14 years of age; and that an office was found, and the queen seised the ward, and granted it to *Edward Nevell* his father, who died possessed, and made him his executor; whereby he was possessed, and tendered a convenable marriage to the said *Mary* when she was within age, *viz.* one *Badger*, and that she refused. Wherefore, &c.—The defendant traverseth the tender; and it was thereupon demurred.—After argument by the *Serjeants*, the Justices delivered their opinions severally.—OWEN and BEAUMOND held, that the plaintiff should recover, because the marriage appertaineth to the lord *de mero jure*, without any tender, and that there needed not any tender to be alledged; and when it is alledged, it is not material, for it shall never be traversable: and that there needed not any tender, they relied upon *the statute of Merton*, that the marriage belongs to the lord *de mero jure*, whether she will marry herself or not; so as the lord hath election to have the marriage, or the value of the marriage; and it is *quasi* a service due to the lord by reason of his tenure, which is due of itself without any other act to be done by the lord, as well as his relief or other duty. The difference hath always been betwixt the double value demanded and the single value: in the first, there ought to be a tender of necessity, because he is to have the penalty upon the heir's refusal; but in the other not: it would also be mischievous to lords, if they should not have it without tender; for it may be the heir might be *essoigned* or beyond sea at the death of his ancestor, and always after until full age, or a close prisoner by the queen's command, so as the lord by no possibility can make a tender; wherefore being a duty due unto him, it is reason he should have it without a tender; and therefore the traverse is not good, and the plaintiff ought to recover.—WALMSLEY and ANDERSON very strong to the contrary, that there ought of necessity to be a tender, and that it is well traversable; for although the lord is to have the marriage of the heir *mero jure* (as the statute is), it is true: but there he ought to do an act to have it (*viz.* to make tender of marriage); for without tender the heir cannot make a refusal: and it is not reason the heir should pay for the value of his marriage, where peradventure he would willingly have accepted thereof, if it had been offered him. And here ought two things to be done to have the marriage: the

one,

NEVELL *against* SYDENHAM.

one, the lord's tender; the other, the heir's acceptance or refusal; and without the first act done by the lord, nothing accrues unto him; and the payment of the value of the marriage, and that the land shall be retained until he pays the value of the marriage, is a penalty inflicted upon him, as in case of the double value; and therefore it is as good reason that there should be a tender in the one, as in the other case: and the *Register* and *Natura Brevium*, and the *Book of Entries*, are all in point, that tender ought to be alledged; and therefore there is not any reason to say it should be vainly and idly alledged; and the statute of *Merton*, cap. 7. which is, "*si hæres pro domino suo noluerit se martiare*," hath been always expounded, that if upon request he will not marry, &c. so always there ought to be the lord's request. And for the mischiefs, they are rather to be suffered than that the law should be changed: and there would on the other side be as great mischief to the heir; for if he should pay for her marriage without tender, she might peradventure be one of such deformity that none will marry with her; and then what reason is there that he should pay for her marriage.—And WALMSLEY said, in case of a female it is more clear; for the words of *the statute of Westm.* 1. cap. 22. which gives the lord two years, after she hath accomplished her age of 14 years, to tender her marriage, the statute there is expressly, that the lord shall tender her marriage within the time; then against an express statute, it is no reason he should have it without tender. Wherefore, &c. *Et adjournatur.—See the books cited. Dyer*, 255. 306. 2. *Hen.* 7. 9. 21. *Edw.* 4. 43. "*Temps*," *Hen.* 8. "*Forfeiture de Marriage*," 7. 40. *Edw.* 3. 6. 31. *Ass.* 26. 35. *Hen.* 6. "*Gard.*" 71. 24. *Hen.* 3. "*Gard.*" 149. 18. *Edw.* 3. 18. 35. *Hen.* 6. 53. (*a*).

(*a*) The tenure by knight's service is now wholly taken away by 12. Car. 2. c. 24. and converted into free and common socage.

Wells *against* Partridge.

CASE 20.

EJECTIONE FIRMÆ of lands in *Uxbridge*. The parties were at issue. Upon the evidence it appeared, that the plaintiff was lessee for three years of a copyholder; and the custom of the manor was proved to be such, that a copyholder there might let the land for three years.—ANDERSON conceived that the lessee of a copyholder cannot maintain an *ejectione firmæ* in any other manner; but if he might, it is clear he ought to shew the estate of his lessor at the first, and the licence of his lessor, and the special custom to warrant that lease; for otherwise being a general count, it shall be intended of a lease at the common law, which a copyholder cannot make: as if the heir in Borough *English* brings a *mort-d'auncestor*, he ought to shew the custom in his count, and declare according thereto. And he held the action to be well maintainable; but he ought to shew the custom, otherwise it is not good. But because there was other clear matter for the defendant, it was passed over, and the verdict found for the defendant.

A declaration in ejectment by the lessee of a copyholder must shew the special custom by which the lease was made. Ante, 462. Post. 483. 535. 676. 717. 728. Co. Lit. 398. a. 4. Co. 26. Owen, 18. Hard. 330. Lutw. 803. Gilb. Ten. 213.

Knight *against* Rushworth.

Hilary Term, 38. *Eliz.*—*In the Common Pleas.*

CASE 21.

ASSUMPSIT. The case was, That one *Mary Rushworth* had entered into a bond of 200l. to the plaintiff; and after gave all her goods to the defendant to pay her debts. The defendant

A promise to pay the bond of a third person in consideration of the obligee going before a magistrate and deposing upon oath that it was rightly read over to the obligor, is sufficient to maintain an *assumpsit*. Ante, 67. 237.

KNIGHT *against* RUSHWORTH.

Cro. Jac. 381. 2. Mod. 166. Sid. 283. Raym. 153. Keb. 26. 44.

pretending that this bond was read to the ſaid *Mary Ruſhworth* as an obligation of 100l. only and ſo void, aſſumed to the plaintiff, that if he and two witneſſes would *deponere* before the mayor of *Lincoln*, that the obligation was read to *Mary Ruſhworth* as an obligation of 200l. that he would pay it. Whereupon the plaintiff, with two others, came before the mayor of *Lincoln*, and there depoſed upon a book accordingly; and hereupon brought this action. Whereto it was demurred.—YELVERTON, *for the defendant*, moved, that this action lies not; for there is not any conſideration beſides this oath, which is unlawful, and therefore void.—HEARN. It is not material whether the conſideration be for the plaintiff's benefit; for if it be any charge or trouble to the defendant, it ſufficeth; as in *Albanie's Caſe*; and he conceived the oath to be lawful enough, he being before the mayor, not only by his authority, but before him alſo as a witneſs. And 2. *Hen.* 4. and *N. B. R.* are, that if a *feme* ſwears that ſhe will not ſue a *cui in vitâ*, the oath is not unlawful, and ſhe might be ſued *pro læſione fidei* in this caſe in the ſpiritual court; but becauſe the matter is merely temporal, the temporal court will grant a prohibition, which allows that the oath is lawful.—ANDERSON. The travail of coming before the mayor is a very good conſideration; and truly the oath is not illegal, being taken before him; and the ſmallneſs of a conſideration is not material, if there be any: and the caſe cited of 2. *Hen.* 4. proves that the oath is not illegal; for the ſpiritual court ought not to meddle therewith, being temporal. But if a woman ſwears to marry ſuch a one, and ſhe be ſued in court chriſtian *pro læſione fidei*, the ſuit is lawful, and no prohibition lies in that caſe; and if one takes an oath before arbitrators in the country voluntarily, which have no authority to take an oath, it hath been puniſhed in the ſtar-chamber, being falſe, for its falſity.—WALMSLEY *accord.* For oaths are in two manners, *viz.* by compulſion, as before judges who have authority to take an oath, or voluntarily by conſent of the party, which is alſo lawful; as

Ld. Raym. 500. 1. Term Rep. B. R. 65.

10. *Edw.* 4. 11. The condition of an obligation was to prove ſuch a thing before *J. S.* it is not to be doubted but that there it may well be by oath before *J. S.*; and the oath being taken voluntarily and without compulſion is lawful enough. And whereas it was objected that the word being *deponere* before the mayor, is a word incertain, for *deponere* is to lay down: but it was held certain enough; for to depoſe or lay down are in truth *ſynonima's et tantamount.*—BEAUMOND and OWEN doubted herein at firſt; but afterwards they agreed with their companions, that the conſideration was ſufficient and lawful.—Wherefore it was adjudged for the plaintiff.

CASE 22.

Matthewſon *againſt* Lydiate.

Ante, Page 408. *Caſe* 20.

Where ſeveral enter into covenants by the ſame deed, and the ſeal of one of the covenantors is torn off, yet it ſhall not diſcharge the others.

Ante, 408. Poſt. 546.

THE caſe was now revived again upon a new action brought, and the matter pleaded in bar as before; and a demurrer thereupon.—GLANVILE moved, that it was a ſeveral deed; for every one covenanted by himſelf that the one ſhould pay, &c. and that the other ſhould pay, &c. and therefore it is as ſeveral deeds in one piece of parchment; and in that regard, although the deed of the one be diſcharged by the breaking off the ſeal, yet it remains the deed of the other.—WARBERTON. Although the firſt words have a covenant *ſeparatim*, yet in the end is this clauſe, *et ad performandum omnes conventiones prædict'*; every of them

2. Lev. 220. 5. Co. 23. 56. 1. Salk. 52, 53. 2. Salk. 574. Bull. N. P. 268. 5. Com. Dig. 232.

separatim bound himself in a double freight, wherein every of them bound himself that the covenants of his companions and his own should be performed, which is joint in itself.—WALMSLEY and BEAUMOND. The covenant is, that every one binds himself *ad performationem omnium conventionum mercatorum prædictor'*; the which extends to every of them, *reddendo singula singulis, viz.* to perform his own covenants.—ANDERSON. I doubt much thereof, for in the premises it is a joint deed; as for a joint demise by joint lessors to joint lessees; and the covenants are in words several; so as if the one had released the covenants to the one of the lessees, that had not discharged the others, for their covenants are several. But if a discharge of the deed of the one be a discharge for all, I doubt much.—Wherefore the Court moved the parties to compound (*a*).

MATHEWSON *against* LYDIATE.

(*a*) It was moved again, and adjudged for the plaintiff, post. 546.

Further *against* Further, and Others.

CASE 23.

DEBT upon an obligation against *F.* and three others, administrators of *J. S.* who pleaded, that one *J. D.* had brought debt in the queen's bench upon an obligation of one hundred pounds against one of the administrators, and recovered by a *nihil dicit*; and that they had *riens in ses maynes* to satisfy over and above the said debt: and it was thereupon demurred.—GLANVILE moved, that this was not any plea; for in regard the defendant in the first action might have abated the bill by saying that he had co-administrators not named, this recovery shall not bind any stranger: this recovery is also covinous, being by default; and in proof thereof *vide* 9. *Edw.* 4. *pl.* 12.—ANDERSON and BEAUMOND held, that it was a good plea *primâ facie*; for a stranger cannot falsify a recovery by reason of joint-tenancy or non-tenancy, or by such dilatories, but only for matter of substance; and if the recovery be for a true debt, it is not reason but that the administrator might suffer it to pass by default; and it is reason it should be allowed to all the others: and if there be any covin, it is to be averred by the plaintiff; for *primâ facie* it shall not be so intended, but that it is true; and if there be any covin in it, he may falsify it for that cause; and a recovery against one administrator shall bind him and all his companions; and therefore it is reason it should bind all strangers. And of that opinion OWEN and WALMSLEY said they were: but they would be advised, &c.

A recovery against one administrator shall bind all; and may be pleaded with no assets *ultra* to an action for another debt of the intestate's. Ante, 41. 426. 1. Lev. 261. W. Jones, 91. 1. Sid. 404. 334. Strange, 409. Vaugh. 95. 100. Vent. 199.

Stapleton's Case.

CASE 24.

DREW moved the Court, that one *Stapleton* of *Yorkshire* being tenant in tail, covenanted to stand seised, in consideration of the marriage of his eldest son, to the use of himself for life, and after to the use of his eldest son for his life, and after to the use of the first son of his eldest son, which should be in tail; and that afterwards the eldest son had issue one *Gilbert Stapleton* his eldest son. The grandfather afterwards upon great cause would sell part of the land, and assure more in recompence to the son, and the purchasors would not take any assurance unless the infant (who was but four years of age) would suffer a recovery; and yet it was conceived that the covenant did not alter any estate;

Tenant in tail covenants to stand seised to the use of himself for life, remainder to his son in tail; this does not make any alteration in his estate; but he remains tenant in tail as before. Ante, 279, 280. Post. 895. Will. 329.

Moor, 32. Yelv. 51. 2. Co. 52. Salk. 619. Com. Rep. 119. 3. Peere

and

Stapleton's Case.

and so it was adjudged in this court, in the case of *Blythman v. Blythman*. *Quod* Walmsley, Beaumond, *et* Owen *concesserunt*. But yet to satisfy the purchasor he prayed, that a guardian might be allowed to that infant, that a recovery might be suffered against him as vouchee.—Whereto the Court agreed; and therefore admitted two gentlemen there present (the infant being brought into court) to be guardians for him; and then a recovery was had of that land at the bar, wherein the infant was vouched; and he by his guardian appeared and vouched the common vouchee.

A guardian appointed to an infant, to enable him to suffer a recovery in order to satisfy a purchasor. Ante, 172. Hob. 197. Cro. Car. 307.

Case 25.

Byron *against* Byron.

Debts by specialty are the deceased's goods in that diocese where they happen to be at the time of his death.

DEBT as administrator of *Byron* upon an obligation. The case was, That the intestate died in *Lancashire*, but the obligation was at *London* at the time of his death; and the bishop of *Chester*, in whose diocese the intestate died, committed administration to *J. S.* who released to the defendant; and the archbishop of *Canterbury* committed the administration to the plaintiff: and this release was pleaded in bar, and it was thereupon demurred.—Warberton. Every debt follows the person of the debtee; and *Chester* is within the province of *York*, where the archbishop of *Canterbury* hath nothing to do.—Anderson. Where one dies who hath goods in divers dioceses in both provinces, there *Canterbury* shall have the prerogative; otherwise there would be two administrations committed, which is *res inaudita*. The debt is where the bond is, being upon a specialty; but debt upon a contract follows the person of the debtor; and this difference hath been oftentimes agreed. *Vide Dyer*, 305. And if the archbishop of *Canterbury* hath not any prerogative in *York*, but that several administrations ought to be committed; yet at leastwise administration for this bond ought to be committed by the archbishop of *Canterbury*. Wherefore this release is not any bar.

1. Roll. Ab. 908. Swinb. 357. 2. Lev. 78. 2. Saund. 274. 3. Sid. 90. 4. Inst. 335. Latch. 85. 2. Lev. 86. Hard. 216. 2. Bulst. 4. Salk. 39. Carth. 374. Godol. 70. Went. 46.

Case 26.

Frampton *against* Stiles.

If an indenture be pleaded as an indenture, a *deed indented* must be shewn.

DEBT upon an obligation conditioned for the performance of certain covenants, *in quâdam indenturâ hic in curiâ prolatâ*. In truth the deed was not indented; but it was written *hæc indentura fact. per Curiam*: and it is not any indenture, although there be two parts thereof.—Wherefore, because the defendant did not shew an indenture by him pleaded, it was adjudged for the plaintiff.

S. C. 5. 0.20.b. Co. Lit. 143. b. 229, a. 2. Roll. Abr. 22. 2. Inst. 262. 2. Brownl. 291. Cro. Jac. 429. 1. Roll. Rep. 408. Dyer, 27. 3. Bac. Abr. 336. 1. Salk. 76.

Case 27.

Anonymous.

If the husband of a *feme* executrix detain part only of the testator's goods, he is an executor *de son tort*. Ante, 406. Post. 410.

DEBT against the defendant as executo[r]. He pleaded, *ne unques executor*, &c. and a special verdict fo[und], that administration of the goods of the testator was comm[itted] to the wife of the defendant, who is dead; and that he ke[pt] *bonam partem bonorum* in his hands, and sold them.—Williams [ob]jected that this verdict was void for the uncertainty; for *bonam pa[rtem]* is altogether uncertain. —But it was held to be well enough; f[or] if he detain any part, it makes him executor *de son tort*, &c. W[here]fore it was adjudged for the plaintiff.

5. Co. 33. Dyer, 105. 166. 253. Moor, 14. Noy, 69. Couldf. 116. 2. Ve[n.] 347. 2. Term Rep. 97. 587. 597.

END OF VOL. I. PART [I.]

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